Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-130

ROBERT J. QUINN, individually and as Commissioner of the Chicago Fire Department,

Petitioner,

vs.

TOM C. CLARK, Justice, JOHN S. HASTINGS, Circuit Judge, JOHN PAUL STEVENS, Circuit Judge, FRANK J. McGARR, District Judge, and FRANCIS MUSCARE,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF MANDAMUS AND PETITION FOR A WRIT OF MANDAMUS, AND, IN THE ALTERNATIVE, PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TOM C. CLARK, Justice, JOHN S. HASTINGS, Circuit Judge, JOHN PAUL STEVENS, Circuit Judge, FRANK J. McGARR, District Judge, and FRANCIS MUSCARE,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF MANDAMUS

The petitioner, Robert J. Quinn, individually and as Commissioner of the Chicago Fire Department, moves the Court for leave to file the petition for a writ of mandamus hereto annexed; and further moves that an order and rule be entered and issued directing the Honorable The United States Court of Appeals for the Seventh Circuit, the Honorable Tom C. Clark, Associate Justice (Retired) of the United States Supreme Court, sitting by designation as a

Judge of the Court of Appeals for the Seventh Circuit, the Honorable John S. Hastings, Senior Judge of said Court of Appeals, the Honorable John Paul Stevens, Circuit Judge of said Court of Appeals, the Honorable The United States District Court for the Northern District of Illinois, and the Honorable Frank J. McGarr, District Judge of said District Court, to show cause why a writ of mandamus should not be issued against them in accordance with the prayer of said petition, and why your petitioner should not have such other and further relief in the premises as may be just and meet.

Respectfully submitted,

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Respondents.

PETITION FOR A WRIT OF MANDAMUS AND, IN THE ALTERNATIVE, PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Robert J. Quinn, individually and as Commissioner of the Chicago Fire Department, respectfully prays that a writ of mandamus issue, pursuant to 28 U.S. Code § 1651 and Rule 31 of the Rules of this Court, directed to the Honorable The United States Court of Appeals for the Seventh Circuit, the Honorable Tom C. Clark, Associate Justice (Retired) of the United States Supreme

Court, sitting by designation as a Judge of the United States Court of Appeals for the Seventh Circuit, the Honorable John S. Hastings, Senior Judge of said Court of Appeals, the Honorable John Paul Stevens, Circuit Judge of said Court of Appeals, the Honorable The United States District Court for the Northern District of Illinois, and the Honorable Frank J. McGarr, District Judge of said District Court, commanding said Court of Appeals to vacate the judgment entered by it in *Francis Muscare* v. *Robert J. Quinn, individually and as Commissioner, Chicago Fire Department,* No. 74-1460, on May 21, 1975 (rehearing denied, June 17, 1975), for the reason that said judgment exceeds the jurisdiction of the Court of Appeals and is void, in that in said judgment the Court of Appeals enjoined petitioner, a local government official, from suspending respondent Muscare, a civil service employee, from his position pursuant to the procedures authorized by Illinois Revised Statutes, 1973, ch. 24, par. 10-1-18, a state statute of statewide application, on the ground that said statute violates the due process of law guaranteed by the United States Constitution—a matter requiring to be determined by a three-judge district court, upon due notice to the governor and attorney-general of the state of Illinois, pursuant to U.S. Code, Title 28, §§2281, 2284, and further commanding said Court of Appeals to remand the said matter to the District Court with directions to convene a three-judge district court and try the case before it.

In the alternative, the petitioner, Robert J. Quinn, individually and as Commissioner of the Chicago Fire Department, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on May 21, 1975 (rehearing denied, June 17, 1975).

OPINIONS BELOW

The findings of fact, conclusions of law and judgment of the district court in favor of defendant-petitioner, entered orally on March 19, 1974 (rehearing denied, March 29, 1974), are unreported, but are reproduced in Appendix A.

The opinion of the court of appeals, filed on March 21, 1975, reversing the judgment of the district court, is reported at ..... F.2d ..... (7 Cir., 1975), and is reproduced in Appendix B.

The judgment of the court of appeals, entered May 21, 1975, is reproduced in Appendix C.

The order of the court of appeals, entered on June 17, 1975, denying the defendant's petition for a rehearing, is reproduced in Appendix D.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1975. On June 17, 1975, the court of appeals entered an order denying defendant's petition for a rehearing with suggestions for rehearing in banc.

A motion for a stay of the mandate pending application to this Court for a writ of certiorari was filed on June 19, 1975. On June 25, 1975, an order was entered by Circuit Judge Stevens, staying the mandate until July 24, 1975.

The jurisdiction of this Court herein rests on U.S. Code, Title 28, §§1254(1) and 1651.

QUESTIONS PRESENTED

1. Whether a single-judge district court or a court of appeals, in an appeal from a judgment of a single-judge district court, has jurisdiction to enjoin the enforcement of a state statute of statewide application, on the ground that it violates the United States Constitution.

2. Whether, in short suspensions of civil service employees, due process is satisfied by provision for post-suspension hearings, with the right to back pay and deletion of the suspension from the employee's service record, in the event the charges against the employee are disallowed.

3. Whether, in the event that due process requires a pre-suspension hearing, any administrative hearing must be held if the employee has actual knowledge of the charge against him, knows that he is in violation of a departmental rule and that the charge is based on that violation, and where the only disputed question is whether the rule is constitutional.

4. Whether a civil service employee, suspended without a trial-type pre-suspension hearing, can complain that he has been denied due process if he fails to exercise his statutory right to a post-suspension hearing, with the right to deletion of the suspension from his employment record and back-pay, in the event he rebuts the charges against him.

5. Whether a city fire department can constitutionally regulate the dress and hair style of its firefighters (1) to ensure the efficient operation of gas masks frequently required to be worn by firefighters, (2) to present a well-groomed and uniform appearance or image to the public, or (3) to promote discipline in a paramilitary setting.

6. Whether a city fire department can constitutionally promulgate general safety rules binding on all members of the department, even though they may not be actually necessary with respect to certain individual members.

CONSTITUTIONAL PROVISIONS, STATUTES AND ADMINISTRATIVE REGULATIONS INVOLVED

Constitution of the United States

Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech. . . ."

Amendment V:

> "[N]or shall any person . . . be deprived of life, liberty or property, without due process of law."

Amendment XIV:

> ". . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Code

Title 28, §§2281, 2284:

> "§2281. *Injunction against enforcement of State statute; three-judge court required.*
>
> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or

commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

"§2284. *Three-judge district court; composition; procedure.*

"In any action or proceeding required by an Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

"(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

"(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney-general of the State.

"* * * * *

"Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof."

Title 42, §1983:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Illinois Revised Statutes, 1973

Chap. 24, par. 10-1-18:

"Except as hereinafter provided in this section, no officer or employee in the classified civil service of any municipality who is appointed under the rules and after examination, may be removed or discharged or suspended for more than 30 days, except for cause upon written charges and after an opportunity to be heard in his own defense . . . Nothing in this Division 1 limits the power of any officer to suspend a subordinate for a reasonable period, not exceeding 30 days except that any employee or officer suspended for more than 5 days or suspended within 6 months after a previous suspension shall be entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension. . . ."

Rules and Regulations of the Chicago (Illinois) Fire Department

Section 51.133:

"All members of the Chicago Fire Department shall present a clean and proper appearance in personal care and attire at all times. The face shall be clean-shaven, except that a non-eccentric mustache is permissible. Mustaches shall not extend beyond a line perpendicular to the corner of the mouth and the full upper lip must be readily visible. Sideburns shall be trimmed short and shall be no lower than a line from the middle of the ear.

"Hair shall be worn neatly and closely trimmed, and the hair outline shall follow the contour of the ear and slope of the back of the neck. It will be gradually tapered overall in order to present a neat appearance."

STATEMENT OF THE CASE

Respondent Francis Muscare has been a firefighter with the Chicago Fire Department since 1955. His present rank is that of lieutenant.

From October, 1973, until the trial of this case in March, 1974, Muscare wore a beard. He did this despite a departmental rule, the existence of which he admitted he was well aware, limiting the facial hair that may be worn by firefighters to at most a small moustache and precisely limited sideburns, with no beard.

Some three years before Muscare had worn the same sort of moustache and beard (R. 17, p. 97). He had been ordered to shave off the beard, but refused (R. 17, p. 98). In consequence, at a uniform inspection, his superior officer declined to inspect him and apparently he at length then brought himself into compliance by shaving.

The following year Muscare again grew a beard (R. 17, p. 99). This time he was summoned before a departmental board, where he was told by a fire chief that he did not know the meaning of discipline and was commanded to shave off his beard before reporting for duty the next day. Muscare reluctantly complied on that occasion also (R. 17, p. 100).

But in December, 1973, when Muscare appeared with his company at the Chicago Fire Academy for instruction in a two-day course in the use of self-contained breathing apparatus or safety masks, he was again wearing a beard. The instructor, Firefighter Leonard Johnson, later testified that he at that time, on the basis of the instructional ma-

terial, informed Muscare that facial hair should not be worn with the safety masks. Muscare disputed this, contending that Boston and New York permit firemen to wear "long hair, beards and moustaches." However, he offered no proof of that.

As Instructor Johnson explained at the trial (R. 17, p. 19), the self-contained breathing apparatus consists of an air cylinder, a face piece, a breathing tube and the harness, on which the tank is mounted. The whole apparatus can be carried on a man's back. The cylinder is charged to 2216 pounds of pressure per square inch and the gas mask can function for 30 minutes. The gas masks cost about $400 each (R. 17, p. 68).

Each member of the class was expected to put the apparatus on, charge it and test it to determine whether he was getting a good facial fit with the apparatus "charged" and with the cylinder and regulator valves open, allowing the high pressure air to flow up through the regulator into the face piece (R. 17, p. 9). Johnson stated he could tell, by watching a fireman do this, whether he had succeeded in obtaining a tight facial seal.

Muscare failed to charge or test his appartus in the class at the Fire Academy (R. 17, pp. 9, 27, 31).

On the second day of the class, each student was expected to walk up to the fifth floor of the Fire Academy and then back down to the first floor, with a gas mask on, sealed and functioning (R. 17, p. 29). Muscare did not do this and, in fact, did not even put the apparatus on (R. 17, p. 11).

Instructor Johnson stated at the trial that he did not know whether Muscare, while wearing his beard, could get

a good seal on a gas mask, because Muscare did not put the gas mask on and a gas mask can be tested only by a man putting it on and testing it (R. 17, p. 31).

After the class was concluded Instructor Johnson reported Muscare's conduct in the class to the drillmaster. According to his complaint, Muscare was "warned" in December, 1973 (R. 1, p. 2; A. 2) "that he would not be permitted to continue working as a firefighter unless he shaved his beard off" and that a few days later he was informed that charges had been filed against him with the administrative authorities of the Fire Department (R. 4, affidavit, p. 1). But, because of the serious illness of the superior officer in whose jurisdiction it lay to determine what disciplinary action, if any, should be taken, the charges against Muscare were not acted upon until February 27, 1974, by which time they had been reviewed and authorized by the Fire Commissioner (R. 17, p. 112).

Muscare was disciplined not only for violating the facial hair provisions of Section 51.133 of the Rules and Regulations of the Chicago Fire Department, but also for refusing to carry out a direct lawful order of his superior officers, in contravention of Section 61.006 of the same Rules and Regulations.

On February 27, 1974, three superior officers of Muscare personally came to the fire station where he was on duty and informed him that he had been suspended for 29 days, effective immediately.

Muscare did not exercise his statutory right, under Illinois law, to a hearing before the civil service commission. Illinois Revised Statutes, 1973, ch. 24, par. 10-1-18, provides:

> ". . . [A]ny employee or officer suspended for more than 5 days or suspended within 6 months after a previous suspension shall be entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension. . . ."

In the event that the civil service commission finds the suspension unwarranted, the employee is entitled to reinstatement, back-pay and erasure of the suspension from his employment record.

Instead of seeking this administrative hearing, Muscare, on March 11, 1974, filed the instant civil rights action under 42 U.S.C. §1983.

The Trial in the District Court

At the trial on March 19, 1974, Muscare rested on his complaint and supporting affidavit (R. 17, p. 4). The defendant then put in almost all the testimony (R. 17, pp. 5-95, 108-115). Plaintiff testified only in a brief attempt to rebut (R. 17, pp. 96-108) defendant's case.

Acting Chief Fire Marshall William F. Foley of the Chicago Fire Department was a witness for the defendant (R. 17, pp. 67-95, 108-115). He explained that the department has used self-contained breathing apparatus or gas masks since 1958 (R. 17, p. 4). They are used particularly in rescue operations in a hostile environment and in an irascible type of atmosphere containing highly toxic, poisonous gas. They are usually worn only at the direction of the company officer. At present there are two such gas masks on each hook and ladder truck. All uniformed members of the Chicago Fire Department are required to be proficient in the use of such self-contained breathing apparatus (T. 73).

Safety, not appearance, Chief Foley declared, is the rationale for the departmental rule restricting the facial hair that may be worn by uniformed firemen to a small, precisely limited moustache and small, precisely limited sideburns, with no beard (T. 84). Facial hair in excess of these limitations, Chief Foley explained, interferes with the operation of the gas masks. In firefighting mistakes can be fatal.

A fire department is a paramilitary organization, Chief Foley also stated, because the department has levels of rank and firemen are expected to carry out orders. The fire department is a uniformed force, and cleanliness and neatness are a part of being uniformed.

Another witness for the defendant was Al Lundin, an officer of the Mine Safety Appliances Company, of Pittsburgh, manufacturers of personal protective devices and particularly of self-contained breathing apparatus used by the Chicago Fire Department. Mr. Lundin also taught a course in the use of such safety devices at the National Safety Council in Chicago, where he gave instruction in the basics of respiratory protection to a student body of safety directors in various companies throughout the United States (T. 46). Lundin declared it to be his expert opinion that facial hair would adversely affect the obtaining of a facial seal by self-contained breathing apparatus of the types used by the Chicago Fire Department. Lundin explained that a perfect seal is possible, so that, during tests with various odorants "it feels like there is absolutely no leakage at all." During tests the individual fireman is expected to be able to carry on normal activities, such as talking and coughing, with his face sealed in the mask.

But although the gas masks are designed to fit all faces, the differences in facial sizes and shapes, Lundin elucidated, can result in facial hair having less effect on obtaining a seal for some individuals than others. As he said, "it is very difficult to form a seal to the face under the best conditions, and facial hair is going to endanger that," and, as the fireman engages in varied strenuous activities during the course of a fire, the seal is apt to be more easily broken if facial hair is worn.

Therefore, it was Lundin's expert opinion, that facial hair would adversely affect the obtaining of a facial seal by self-contained breathing apparatus of the types used by the Chicago Fire Department (T. 15).

Plaintiff Muscare testified briefly by way of rebuttal. He stated he had been a member of the Chicago Fire Department almost 20 years. Muscare admitted he was familiar with the fire department regulation concerning facial hair and that he had read it at roll call. In fact, he volunteered the information that he had twice in the past been formally reprimanded for wearing a beard in violation of the rule, and that on each occasion he had complied by shaving it off.

Muscare affirmed that he had tested the apparatus while wearing a beard and that he had gotten a good fit and the apparatus worked. But he did not attempt to validate that assertion by a demonstration in the courtroom. Muscare presented no expert witnesses on gas masks. Nor did he put any other firemen on the witness stand to recount their experience with the department's gas masks while wearing facial hair.

The Opinion of the District Court

At the conclusion of the hearing on a preliminary injunction on March 19, 1974, District Judge Frank McGarr, in denying the application, entered oral findings of fact and conclusions of law (reproduced in Appendix A), which he later made applicable to his denial of a permanent injunction on March 29, 1974.

Judge McGarr affirmatively recognized that the wearing of facial hair is a form of expression protected by the First Amendment (R. 15, p. 3). He found that Muscare's appearance as depicted in the photographs (R. 1, Exhs. A, B) was substantially identical with his appearance in court (R. 15, p. 4). The court found that Muscare's small moustache was not in violation of departmental regulations, but that his full goatee, or small beard, was "clearly prohibited" by Regulation 51.133 of the Chicago Fire Department.

The question presented, the court stated, is "whether this regulation is a violation of the plaintiff's rights to First Amendment expression or whether, in fact, it is a reasonable curtailment of his rights for some justifiable and good reason which the Department advances" (R. 15, pp. 3, 4).

Judge McGarr did not regard as determinative the evidence as to whether Muscare's facial hair actually did or did not interfere with his effective personal use of a gas mask. The court declared (R. 15, p. 5):

> "What we have before us is the validity of a regulation and its reasonableness generally. And the question of whether it is reasonable in terms of the individual context, which was raised here, I don't think is relevant."

The safety reason for the regulation, which the department advanced in its justification, the court found adequate to sustain the regulation's constitutionality—whether or not safety was indeed the basic reason for the adoption of the regulation. For this reason, Judge McGarr concluded that the regulation is merely "[a] minor abridgement of personal liberty, which is justified by safety requirements" (R. 15, p. 6).

The court expressly refrained from assessing the substantiality of the public image and paramilitary discipline rationales the department also urged.

Nor did the district court rule on the question of whether the department's suspension procedure provided due process. That issue was raised in the complaint (R. 1, pp. 1, 5, 6). But the plaintiff offered no evidence in support of that contention and apparently neglected to urge the issue at the trial.

Denial of Plaintiff's Motion for Reconsideration

In a motion filed March 26, 1975 for reconsideration or amendment of the judgment (R. 12, 13), plaintiff argued that "even where the State can reasonably assert that a legislative regulation accurately applies to most people falling into a classification, when a case-by-case determination is available, the due process clause requires such an individualized determination." (R. 13, p. 4). Averring (p. 5) that "[s]uch a test is not merely available; it is currently in use," plaintiff contended that "where, as here, the general rule invades a fundamental constitutional right, such a general regulation is unconstitutional."

The motion also maintained (p. 7) that plaintiff had been denied due process on the basis of his unproven as-

sertions that he had been "cut off from his job" "[w]ithout notice of the charges against him, without an opportunity to be heard in his own defense."

On March 29, 1974, the district court denied plaintiff's motion for reconsideration or amendment of its judgment.

The Per Curiam Opinion of the Seventh Circuit

The per curiam opinion of the U.S. Court of Appeals for the Seventh Circuit, filed May 21, 1975, refrained from attempting to resolve the question of the constitutionality of the fire department's regulation of the facial hair of firemen (App. B3), on the ground that it found Muscare had been "suspended without procedural due process."

The court of appeals reached this result despite its finding (App. B4) that Muscare's superior officer, Chief Morgan, had in December, 1973, "warned him that he would not be permitted to continue working as a firefighter unless he shaved off his beard" and that, a few days thereafter, Muscare "was informed that charges had been filed against him with the administrative authorities." The opinion also found that two and a half months elapsed after that before Muscare was suspended.

The opinion also disallowed the constitutional adequacy of the provision in Illinois Revised Statutes, 1973, ch. 24, par. 10-1-18, for a post-suspension hearing before the civil service commission concerning the propriety of the suspension, available in cases of suspensions of more than 5 days—a right Muscare had failed to exercise.

The court of appeals ruled that "post-suspension review is insufficient," although it specifically admitted (App. B5) that the Illinois Supreme Court had recently held to the

contrary in *Kropel* v. *Conlisk*, 60 Ill. 2d 17 (decided January 30, 1975).

The per curiam opinion stated (App. B6) that it considered the decision in *Goss* v. *Lopez*, ... U.S. ....., 42 L. ed. 2d 725 (decided January 22, 1975), determinative in resolving the instant case. Recognizing that Muscare had a protected property interest in his employment, the court of appeals applied the rationale of *Goss* in the following terms (App. B6):

> "In the circumstances of America's high schools, the Court thought that notice, an explanation of the evidence the authorities have, and an opportunity to present his side of the story were sufficient to protect the student, and we think that at least this much is required in the circumstances of a public employee's suspension."

In addition, the per curiam opinion (App. B7, 8) found confirmation of its view in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974).

The opinion did recognize (App. B8) that, in a wide variety of emergency situations, "where harm to the public is threatened, and the private interest is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing." But the court made no attempt to clarify in what sort of specific situations disciplinary action could be taken without a pre-suspension hearing.

The City's petition for rehearing, with suggestions for rehearing in banc, was duly filed on June 4, 1975, and denied on June 17, 1975.

On June 25, 1975, Circuit Judge Stevens entered an order staying the mandate of the Seventh Circuit until July 24, 1975.

REASONS FOR GRANTING A WRIT

I.

THE JUDGMENT OF THE COURT OF APPEALS IS VOID.

IT ENJOINED SUSPENSION OF A CIVIL SERVICE EMPLOYEE PURSUANT TO A STATE STATUTE OF STATEWIDE APPLICATION.

SUCH AN ORDER IS WITHIN THE EXCLUSIVE JURISDICTION OF A THREE-JUDGE DISTRICT COURT, WITH THE RIGHT OF DIRECT APPEAL TO THIS COURT.

The complaint (R. 1) filed sought to enjoin the suspension of plaintiff by the Chicago Fire Department for violation of its grooming regulations on the ground that the regulations violated the United States Constitution. It was also alleged in that pleading that his suspension "without any prior notice or opportunity for a hearing" violated plaintiff's right to due process of law guaranteed by the federal constitution (R. 1, p. 5).

The plaintiff did not ask for the convening of a three-judge district court. It is possible that one was not required as plaintiff's case was stated at that juncture, since the injunction sought was only against enforcement of a local regulation by defendant, a local official. *Ex parte Collins,* 277 U.S. 565, 72 L.Ed. 990 (1920); *Petition of Public National Bank of New York,* 278 U.S. 101, 73 L.Ed. 202 (1928); *Wilentz* v. *Sovereign Camp, W.O.W.,* 306 U.S. 573, 83 L. Ed. 994 (1939).

The hearing on the preliminary injunction (R. 17, pp. 1-115) did not touch on the alleged denial of due process,

nor did the oral findings of fact, conclusions and opinion of the district court in denying a preliminary injunction (R. 13, "Excerpt," pp. 1-7, R. 14), later made applicable in the district court's denial of a permanent injunction (R. 14).

However, in the court of appeals attention was focused on the due process issue. More than three pages of the appellant's brief (pp. 20-23) was devoted to an argument that Muscare had been suspended without an opportunity to respond to the charges against him prior to being suspended and that he therefore had been denied due process. The appellee's brief (pp. 24-26) pointed out that plaintiff did not receive an administrative hearing on his suspension only because he himself failed to exercise his statutory right to such a hearing. The statute thus referred to is Illinois Revised Statutes, 1973, ch. 24, par. 10-1-18—a state statute of statewide application. This provides, as previously noted, that a civil service employee suspended for not more than 30 days, but for more than 5 days, is "entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension."

The reply brief of the appellant (pp. 11, 12) acknowledged that "[u]nder Ill. Rev. Stat., ch. 24, §10-1-18, Illinois Law does provide that after his suspension, Plaintiff had the right to request a hearing before the Civil Service Commission to look back on the impropriety of such a suspension." But the reply brief maintained that "no such remedies after the fact could afford him the kind of due process to which he is entitled under the United States Constitution."

In advancing this contention, Muscare attacked the constitutionality under the federal constitution of a state statute of statewide application. In seeking to enjoin his sus-

pension, which had been effected under this statewide statutory procedure, Muscare was seeking to enjoin a local official proceeding under state legislation embodying a policy of statewide concern and application.

The court of appeals agreed with the appellant that Ill. Rev. Stat. 1973, ch. 24, par. 10-1-18, did not satisfy due process and, on that ground, reversed the district court's denial of an injunction against Muscare's suspension pursuant to that state statute.

Title 28, §2281, of the United States Code provides:

> "*§2281. Injunction against enforcement of State statute; three-judge court required.*
>
> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application thereof is heard and determined by a district court of three judges under section 2284 of this title."

A three-judge court is properly convened where a state statute applying generally to all local officials of a given type is challenged on federal constitutional grounds in an injunction proceeding brought against a local official of the type described in the statute. *Sailors* v. *Board of Education of the County of Kent,* 387 U.S. 105, 107 (1967); *Spielman Motor Sales Co.* v. *Dodge,* 295 U.S. 89 (1935).

Where a three-judge district court is required, that requirement is jurisdictional. As this Court stated in *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 154 (1963):

> "The legislative history of §2282 and of its complement, §2281, requiring three judges to hear injunctive suits directed against federal and state legislation, respectively, indicates that these sections were enacted to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme, either state or federal, by issuance of a broad injunctive order."

Chief Justice Hughes declared in *Stratton* v. *St. Louis S.W. Ry. Co.,* 282 U.S. 10, 15 (1930):

> "If an application for an interlocutory injunction is made and pressed to restrain the enforcement of a state statute, or of an administrative order made pursuant to a state statute, upon the ground that such enforcement would be in violation of the Federal Constitution, a single judge has no jurisdiction to entertain a motion to dismiss the bill on the merits. He is as much without power to dismiss the bill on the merits, as he would be to grant either an interlocutory or a permanent injunction. His authority is strictly limited to granting, upon proper cause being shown, a temporary restraining order to be effective only pending the determination of the application for an interlocutory injunction. Upon making such an order, it is his duty to call two other judges, as the statute directs, to assist him in hearing and determining that application. *Ex parte Northern Pacific Railway Co.,* 280 U.S. 142, 144."

Under Title 28, §2284 of the U.S. Code, it is also provided:

> "(2) If the enactment involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney-general of the State.
>
> "• • • • •

"Such notice shall be given by registered mail or by certified mail by the clerk. . . ."

That requirement was also not complied with in the instant case.

It makes no difference that none of the parties requested the convening of a three-judge district court. It is the duty of the district judge, on receiving an application for an injunction to restrain enforcement and operation of a state statute, upon the ground of its federal unconstitutionality, himself to initiate the necessary procedures for the setting up of a three-judge district court. *Borden Company* v. *Liddy,* 309 F.2d 871, 876 (8 Cir., 1962).

As the Tenth Circuit declared in *Riss & Co.* v. *Hoch,* 99 F.2d 553, 555 (10 Cir., 1938), a case in which the parties had stipulated to a single-judge court:

> "The requirement of a three-judge court is not a mere privilege or right which the parties may waive. It is a jurisdictional requirement.
>
> "Accordingly, where a court of three judges should have been convened, and was not, this Court may issue a writ of mandamus to vacate the order or decree entered by the district judge and directing him, or such other judge as may entertain the proceeding, to call to his aid two other judges for the hearing and determination of the application for an interlocutory injunction." *Stratton* v. *St. Louis Southwestern Ry. Co.,* 282 U.S. 10, 16 (1930), citing *Ex parte Metropolitan Water Co.,* 220 U.S. 539 (1911), and *Ex parte Northern Pacific Ry. Co.,* 280 U.S. 142, 144 (1929).

It follows from the above that, since the judgment of the single-judge district court was beyond its jurisdiction and void, no appeal lay to the court of appeals. The case should have been heard by a three-judge district court, with the statutory right of direct appeal to this Court.

The petitioner requests this Court to vacate the void judgments of the district court and of the court of appeals herein and to issue its writ of mandamus, directing the district judge to bring about the convening of a three-judge district court to consider and determine this controversy in the proper manner.

II.

THE RULING OF THE SEVENTH CIRCUIT HEREIN IS IN DIRECT CONFLICT WITH THE DETERMINATION OF THE SAME ISSUE BY THE ILLINOIS SUPREME COURT.

BECAUSE OF THE PUBLIC IMPORTANCE OF THE QUESTION, THIS CONFLICT REQUIRES RESOLUTION BY THIS COURT.

In the event that this Court sees fit to disallow petitioner's application for a writ of mandamus, there is ample ground for the issuance of a writ of certiorari for a review by this Court of the merits of the controversy.

The per curiam opinion of the Seventh Circuit is in direct conflict with the opinion of the Illinois Supreme Court in *Kropel* v. *Conlisk*, 60 Ill. 2d 17 (decided January 30, 1975), as the court of appeals itself recognized (App. B5).

Kropel examined the constitutionality of the summary suspension procedures of the Chicago Police Department, which are similar to those of the Chicago Fire Department and, like those, established by state statute (Sections 10-1-18 (all civil service employees except Chicago police) and 10-1-18.1 (Chicago police) of the Illinois Municipal Code (Ill. Rev. Stat. 1973, ch. 24, par. 10-1-18, 10-1-18.1)). These provide:

(1) A classified civil service employee of a municipality may not be discharged or suspended for more than

30 days, except for cause upon written charges and *after* an opportunity to be heard in his own defense;

(2) Employees may be suspended by their superiors for a reasonable period, but not exceeding 30 days; but

(3) Employees suspended for more than 5 days, or suspended more than once within 6 months, are entitled, *upon request,* to a hearing before the civil service commission concerning the propriety of the suspension. (Emphasis supplied.)

The Illinois Supreme Court in *Kropel* authoritatively interpreted these statutory provisions of state law thus (60 Ill. 2d at 26, 27):

> "It is clear from all the statutes and rules . . . that a major difference between a suspension for less than 30 days and a suspension for more than 30 days is that the latter requires a hearing *before* the sentence can be imposed. In effect, the department has the duty to go into a hearing and prove its case for suspension of more than 30 days. *In the former instance the burden is on the employee to seek review* and establish why the suspension is unwarranted." (Emphasis supplied.)

The Circuit Court of Cook County, Illinois, had (like the Court of Appeals for the Seventh Circuit subsequently), found the provision for suspensions not exceeding 30 days, without a pre-suspension hearing, unconstitutional. In reversing the Circuit Court of Cook County, the Illinois Supreme Court interpreted the statute as providing for "some manner of review for suspensions for less than 30 days" (60 Ill. 2d at 26).

The Illinois Supreme Court recognized that even short suspensions "have a substantial economic impact on the employee" (60 Ill. 2d at 21) and ruled (*id.*):

> ". . . [I]t is implicit in the language of the statute that if the employee is vindicated at the hearing, the commission shall enter such orders as to ensure the employee does not suffer monetarily from the suspension or professionally by the unrefuted allegations against him on his work record."

The provisions for review of suspension of 30 days or less, with the right to reinstatement and back-pay in the event the employee is vindicated, satisfies due process, in the considered judgment of the Illinois Supreme Court, authoritatively interpreting applicable state law in such manner as to safeguard its constitutionality.

In so holding, the Illinois Supreme Court reached the same conclusion as that of the majority of the justices of this Court in *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), who ruled that due process does not require a pre-discharge hearing (*a fortiori,* does not require a pre-suspension hearing).

Despite this, the Seventh Circuit has placed itself in direct conflict with the highest court of Illinois concerning the construction of, and application of the federal Constitution to, a state statute of statewide application.

Resolution of this conflict is clearly a matter of public importance. The issue can be clarified only by this Court. Until it is, the myriad of minor disciplinary cases arising among the more than 40,000 employees of the City of Chicago and, indeed, among the several hundred thousand state and local governmental employees in Illinois, will be carried on amidst uncertainty and confusion.

This, in itself, constitutes a valid reason for the granting of certiorari by this Court. Stern and Gressman, Supreme Court Practice (1969 ed.), p. 163, sec. 4.9.

III.

THE DECISION OF THE SEVENTH CIRCUIT IS ALSO IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

(1) The per curiam opinion of the court of appeals (App. B7, 8) endeavored to find confirmation of its own analysis of the question herein presented in this Court's disposition of *Arnett* v. *Kennedy,* 416 U.S. 134 (1974). That effort was based on a misreading of *Arnett* v. *Kennedy,* with which the opinion of the Seventh Circuit is in direct conflict.

In *Arnett,* it will be recalled, a majority of five justices held that due process is satisfied by administrative procedures which provide for a post-removal hearing, with the right to reinstatement and backpay if the removal decision is later found to have been wrongful.

Kennedy was a nonprobationary federal civil service employee, who was dismissed from his position in the Office of Economic Opportunity for allegedly making recklessly false and defamatory statements about other employees of that agency. Instead of pursuing his administrative remedy under civil service regulations, which afforded him the right to reply to charges and required that the material on which his dismissal was based be made available to his inspection, Kennedy brought a civil action for declaratory and injunctive relief. He contended that he was entitled to a trial-type pre-removal hearing before an impartial hearing officer. A three-judge district court agreed with him.

This Court rejected Kennedy's contention and reversed the district court in a 5-4 decision. It will be recalled that of the five justices in the majority, a plurality of three—

the Chief Justice and Justices Stewart and Rehnquist—were of the opinion that the employee's rights were limited to those afforded by the Lloyd-LaFollette Act of 1913 (5 U.S. §7501), which expressly states "no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal." The plurality of three, speaking by Justice Rehnquist, felt that the due process clause does not require any pre-removal procedure beyond that embodied in whatever statute created the expectancy of job retention.

Two justices—Justices Blackmun and Powell—reached the same "conclusion on the basis of different reasoning" (at 164). Balancing the property rights of the individual employees in their jobs against the interest of the government in having the discretion expeditiously to remove employees who hinder efficient operation, they held that the due process requirements of notice and hearing were satisfied by the statutory provision for a post-removal evidentiary hearing, with reinstatement and back pay should the removal decision be proven to have been wrongful.

In rejecting the contention that due process requires a pre-removal hearing, Justice Powell observed (at 168):

> "Prolonged retention of a disruptive or other unsatisfactory employee can adversely affect discipline and moral in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial."

A sixth member of the Court, Justice White, was of the opinion that, while a property interest in public employment was created by statute, the requisites of due process are defined not by statute, but by the Constitution. He was of the view that due process requires a hearing at some time before the discharge becomes final, but this need not be a trial-type hearing and it need not occur before the discharge becomes effective. It is sufficient if there is some kind of a hearing at some time (416 U.S. at 178). However, Justice White concluded that Kennedy had been denied due process because the hearing officer was the person Kennedy was charged with having slandered. Thus, Justice White concurred in part, dissented in part.

Three justices—Douglas, Brennan and Marshall—wholly dissented, being of the opinion that due process requires a trial-type pre-discharge (or pre-suspension) hearing.

The Seventh Circuit has misread *Arnett* v. *Kennedy* by erroneously attributing to Justices White, Blackmun and Powell the opinion that a pre-discharge (or pre-suspension) hearing must be had to satisfy due process, and by also mistakenly attributing to Justice White the view that a trial-type hearing is required.

(2) *Goss* v. *Lopez*, ... U.S. ....., 42 L.Ed. 2d 725 (1975), is claimed by the Seventh Circuit to be determinative of the result it reached in this case. The per curiam opinion declares (App. B6):

> "Though *Goss* is a 'school' case, it nevertheless points the way to our resolution of the present case."

In like manner, in denying the petition for rehearing, the court of appeals attributed its conclusion to *Goss* (App. D), which it again interpreted as mandating a pre-suspension hearing.

Goss, however, actually stands for the proposition that a public school student cannot be suspended or expelled unless he is granted a hearing either before or promptly after suspension or expulsion. In so ruling the Court was affirming a three-judge district court, which had held that the plaintiff students had been denied due process because they had been suspended without a hearing before or after. And Justice Powell, in dissenting, so understood the opinion of the majority in *Goss*, which he described in the following terms (42 L.Ed. 2d at 741):

> "The Court . . .justifies this unprecedented intrusion into the process of elementary and secondary education by identifying a new constitutional right: the right of a student not to be suspended for as much as a single day without notice and a due process hearing either before or promptly following the suspension."

Indeed, the majority opinion of Justice White in *Goss* recognized (42 L.Ed. 2d at 737) that:

> ". . . [T]he interpretation and application of the Due Process Clause are intensely practical matters and . . . 'the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961)."

Actually *Goss*, in the context of the school situation, came to a result closely paralleling the conclusion, in an employment context, of the Illinois Supreme Court in *Kropel* v. *Conlisk*, 60 Ill. 2d 17 (1975), which interpreted the Illinois statute as requiring a hearing in the suspension of any civil service employee for 30 days or less, if the employee requests it, promptly after the suspension, with the right to backpay and correction of his employment record, if the employee is vindicated.

IV.

IN FACT, MUSCARE HAD AMPLE NOTICE OF THE CHARGES AGAINST HIM AND DID RESPOND TO THEM.

FURTHERMORE, MUSCARE ADMITTEDLY WAS IN VIOLATION OF DEPARTMENTAL REGULATIONS AND ADMITTEDLY DISOBEYED AN ORDER OF HIS SUPERIOR OFFICER.

THE ONLY ISSUES TO BE SETTLED WERE WHETHER THE REGULATIONS AND ORDER WERE CONSTITUTIONAL AND THESE QUESTIONS COULD NOT BE DETERMINED IN AN ADMINISTRATIVE HEARING.

THESE ISSUES WERE JUDICIALLY DETERMINED. MUSCARE RECEIVED DUE PROCESS IN ABUNDANCE.

Paragraph 9 of the complaint filed by Muscare alleges (R. 1, p. 3):

> "9. Section 51.133 of the Rules and Regulations of the Chicago Fire Department provides as follows:
>
> "Section 51.133. Proper Personal Appearance . . . The face shall be clean-shaven, except that a non-eccentric mustache is permissible. Mustaches shall not extend beyond a line perpendicular to the corner of the mouth and the full upper lip must be readily visible."

Paragraph 11 of the complaint (R. 1, p. 4) states:

> "11. Section 61.006 of the Rules and Regulations of the Chicago Fire Department provides as follows:
>
> "Part VI
>
> "Offenses, Procedures And Penalties In Respect To Violation Of The Rules And Regulations, Practices And Procedures Of The Chicago Fire Department
>
> "• • •
>
> "Section 61.006. Disobedience of Orders."

Exhibits A and B, attached to Muscare's complaint (R. 1) portray Muscare, front-view and side-view, wearing a goatee or beard, i.e. a vigorous growth of facial hair.

Paragraph 5 of the complaint (R. 1, p. 2) avers:

> "5. In December, 1973, Plaintiff's superior officer, Chief Morgan, warned him that he would not be permitted to continue working as a fire fighter unless he shaved his beard off. A few days thereafter Plaintiff was informed that charges had been filed against him with the administrative authorities of the Fire Department."

Paragraph 6 of the complaint (R. 1, p. 2) states that it was not until "two and one-half months later, on Wednesday, February 27, 1974" that Muscare was suspended for 29 days.

Muscare's only defense is that the pertinent departmental regulations and the order of his superior officer that he disobeyed were unconstitutional. But the commissioner of the Chicago Fire Department and the civil service commission have no jurisdiction to decide constitutional questions.

Muscare did not exercise his statutory right to an administrative review of his suspension. Instead, he filed this civil rights action in federal court. An evidentiary hearing was conducted by the district court on the constitutional questions and judgment entered upholding the validity of the departmental grooming regulation and, in consequence, the validity of the order enforcing it.

Muscare was afforded due process in abundance on the only issues in controversy.

V.

THE RULING OF THE DISTRICT COURT THAT LIMITING THE LENGTH OF A FIREMAN'S FACIAL HAIR FOR REASONS OF SAFETY IS CONSTITUTIONAL SHOULD BE UPHELD BY THIS COURT.

The decision of the district court that the rule limiting the length of a fireman's facial hair is constitutional is in accord with the great weight of authority, as indeed is clear from the per curiam opinion of the court of appeals (App. B3, n. 2), which cites *Stradley* v. *Anderson,* 478 F. 2d 188 (8 Cir., 1973), *Yarborough* v. *City of Jacksonville,* 363 F. Supp. 1176 (MD, Fla. 1973); *Akridge* v. *Barres,* 321 A. 2d 230 (NJ, 1974); *Hordowich* v. *Board of Police and Fire Commissioners,* 18 Ill. App. 3d 20 (1974); *Michini* v. *Rizzo,* 379 F. Supp. 837 (ED, Pa. 1974), affd. ..... F.2d ..... (3 Cir., March 24, 1975); *Manco* v. *Town of Irvington,* 313 A. 2d 219 (NJ, 1973), aff'd., 313 A. 2d 204 (NJ, 1974), as upholding the validity of such rules. The same conclusion was also arrived at in the more recent case of *Marshall* v. *District of Columbia,* 392 F. Supp. 1012, 43 L.W. 2418 (DC, DC, April 1, 1975).

Yet the court of appeals failed to reach the question of the constitutionality of the facial hair regulation (App. B3), in effect vacating the judgment of the district court on the real issue in any hearing on Muscare's suspension, without disallowing the cogency of the district court's findings and conclusion.

The district court had upheld the facial hair prohibition on the ground that the evidence established that the regulation was justified by considerations of safety applicable generally. It ruled that the factual question whether or not

Muscare could individually obtain a good seal on a gas mask despite his facial hair was irrelevant. (R. 15, p. 5; App. A5).

The court of appeals failed to recognize the general nature of a departmental regulation, its general applicability despite individual differences. Instead, it found (App. A4) that Muscare had asserted he had never experienced any difficulty in getting a good seal on a gas mask while wearing a beard (an assertion Muscare refrained from attempting to demonstrate to his superiors or at the trial). The per curiam opinion of the court of appeals seems to imply that this imposed a burden of proof on the department to establish that Muscare individually could not get a good gas mask seal while sporting whiskers.

Such lapses of common sense, resulting from judicial (but lay) intervention in the day-to-day operation of a large metropolitan fire department, also merit review by this Court.

CONCLUSION

For the foregoing reasons, a writ of mandamus should issue, directing that the judgments below be vacated and the case tried before a three-judge district court, with the right of direct appeal to this Court.

In the alternative, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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July 21, 1975

APPENDIX A

1 IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

Tuesday, March 19, 1974 2:00 o'clock p.m.
Before the Honorable FRANK J. MCGARR, *Judge*

• • • • •

2 The Court: We are considerably beyond the close of the trial day. Questioning has been broad and in many respects argumentative on both sides. And the areas of argument toward which the questions are directed and are easily inferred. And for this reason I would not require a final argument, which would carry the matter over until tomorrow.

The determination of the application or denial of the application for a preliminary injunction requires that I state certain findings of fact and conclusions of law. Because the matter is simple, I will not require the parties to submit them to me in the form of proposals, but will rather announce findings of fact and conclusions of law now, from the bench, and you may regard my remarks as compliance with the Rule.

Let me first say that I do find that I have jurisdiction in the matter.

And let me note, secondly, the only piece of original research that I have been able to do is the dictionary definition of "goatee", which seems to have become significant in the case. Webster's Seventh New Collegiate Dictionary—which was the first one at hand—says that a goatee is "a small, trim, pointed or tufted
3 beard on a man's chin." As I speculate on this, it seems

to me that it is obvious that a goatee is a beard and that the significance of the word is that it is certain type of a beard, characterized by smallness and, perhaps, by the fact that it is pointed.

I think the decisions make it clear that facial hair is a form of expression protected by the First Amendment.

The evidence makes it clear that the Fire Department regulations prohibit facial hair, except for noneccentric moustaches.

I note that the plaintiff has a small moustache, as evidenced in the photographs attached to his pleadings; and as evidenced by his personal appearance here in court. Which moustache is obviously not eccentric and obviously not a violation of the regulations. And, therefore, obviously not relevant in the case we have here.

The plaintiff also has a rather full goatee or small beard, which is clearly a type of facial hair prohibited by the Fire Department regulations.

The question, therefore, becomes whether the regulations prohibiting the goatee—which is obviously the reason for the suspension, and I so find—whether this regulation is a violation of the plaintiff's rights to
4 First Amendment expression or whether, in fact, it is a reasonable curtailment of his rights for some justifiable and good reason which the Fire Department advances.

The comments I make concerning the goatee in question need not be too detailed for the reason that the plaintiff was good enough to attach to his pleadings a photograph. And I merely make the finding that the appearance of the plaintiff in the photograph is substantially identical to his appearance here in court today.

The plaintiff's hair and sideburns can, with some slight stretching, be deemed to be in compliance with Fire Department regulations. Which, once again, reaffirms my contention that the only issue is whether the goatee or small beard was the reason for the suspension and whether that suspension was justifiable under the circumstances.

I find that the plaintiff was suspended for twenty-nine days, by virtue of a notice dated February 28, 1974; and that the suspension notice alleges violations of Regulation 61.001, 61.006 and 51.133 of the Fire Department regulations.

The two regulations in the 61 series are general and are not deemed by me, at least, to be relevant or per-
5 tinent to the issues here.

Regulation 51.133 focues on the precise issue, in that it relates to hair. It is titled "Personal Appearance", but relates almost entirely to hair and refers to haircuts, moustache, sideburns and beard.

I find that the plaintiff's facial hair or his goatee violates Regulation 51.133.

There has been evidence as to whether Lt. Muscare's facial hair does or does not interfere with the proper fit and seal of a face mask or for a breathing apparatus.

What we have before us is the validity of a general regulation and its reasonableness generally. And the question of whether it is reasonable in terms of the individual context, which was raised here, I don't think is relevant.

Neither, as we have said before, is the eccentric moustache issue relevant here, inasmuch as I find Lt. Muscare's moustache is not eccentric, and falls within the permissible moustache rules of the Fire Department.

I am not addressing myself in this ruling at all to the issue of whether the Fire Department have dress and appearance code, solely for uniformity and the
6 impression made on the public by what has been called a paramilitary organization. I set that issue aside, as one which need not be considered here.

The question here is whether we have a justifiable regulation on the basis of which the Fire Department purports to justify it. The Fire Department justifies it on safety grounds and relates to face mask fit for self-contained breathing apparatus as the basic reason for the regulation. If it is—whether it is the basic reason or not, or whether it is the only reason or not, really I find that if it is a reason, I need not go any further.

After hearing the evidence, examining the exhibits, I find the justification of the Fire Department, that is, the requirement limiting facial hair for reasons of safety related to the fit of the face mask of self-contained breathing apparatus, is neither capricious or arbitrary justification. It appears to be grounded in reason. And it also appears to involve a minor abridgement of personal liberty, which is justified by safety requirements.

Fortunately, for the Court, I am not required to become an instant expert on self-contained breathing apparatus. I am required only to determine under law
7 whether the defense rationale and justification for this regulation is reasonable. And in the context of safety, I find that it is.

The plaintiff's motion for a preliminary injunction, therefore, is denied.

• • • • •

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

Before CLARK, *Associate Justice**, HASTINGS, *Senior Judge*, and STEVENS, *Circuit Judge*.

PER CURIAM. Appellant-Muscare, a fireman with the Chicago Fire Department since 1955, was suspended from his duties for a 29-day period from February 27 to March 28, 1974, on the ground that his "goatee" violated

* Associate Justice Tom C. Clark, United States Supreme Court (Ret.) is sitting by designation.

the Department's hair regulations.[1] On March 11, 1974, appellant filed a complaint in the United States District Court for the Northern District of Illinois seeking injunctive relief and claiming that his constitutional right to determine his personal appearance had been violated. The district court held a hearing on the matter and denied relief.

On this appeal, Lt. Muscare strenuously argues that this circuit's decision in *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), cert. den., 398 U.S. 937 (1970), compels a recognition of the "right to wear one's hair at any length or in any desired manner [as] an ingredient of personal freedom protected by the United States Constitution," 419 F.2d at 1037, and requires an invalidation of the Department's regulation, absent any showing of "substantial justification" for the restrictions. The Department argues that its regulation can be justified on the basis of: (1) the need to insure the efficient operation of gas masks which must at times be worn by fire-fighters; (2) the need for discipline in a paramilitary setting; and (3) the need to present a well-groomed and uniform appearance or image to the public. The sufficiency of these various rationales is a

[1] Section 51.133 of the Rules and Regulations of the Chicago Fire Department provides:

> Section 51.133, PROPER PERSONAL APPEARANCE
>
> All members of the Chicago Fire Department shall present a clean and proper appearance in personal care and attire at all times. The face shall be clean-shaven, except that a non-eccentric mustache is permissible. Mustaches shall not extend beyond a line perpendicular to the corner of the mouth and the full upper lip must be readily visible. Sideburns shall be trimmed short and shall be no lower than a line from the middle of the ear.
>
> Hair shall be worn neatly and closely trimmed, and the hair outline shall follow the contour of the ear and slope to the back of the neck. It will be gradually tapered overall in order to present a neat appearance.

matter of considerable dispute in the decided cases;[2] however, we find it unnecessary to resolve that controversy in this case, for appellant was suspended without procedural due process.

It appears that appellant's goatee first came to the attention of his superiors in December 1973, when Lt. Muscare, along with the rest of his company, attended a class at the Chicago Fire Academy, taught by one Leonard Johnson, a drill instructor, to train firefighters in the use of self-contained breathing apparatus. At that time, Instructor Johnson, using instructional materials which had been provided him, informed Lt. Muscare's company that facial hair should not be worn with the

[2] Some courts have upheld hair regulations solely on the basis of "paramilitary" discipline or the need to present a well-groomed image to the public, *see Stradley v. Anderson*, 478 F.2d 188 (8th Cir. 1973) (police); *Yarborough v. City of Jacksonville*, 363 F. Supp. 1176 (M.D. Fla. 1973) (firemen); *Akridge v. Barres*, 122 N. J. Super. 476, 300 A. 2d (1973), aff'd, 65 N.J. 266, 321 A. 2d 230 (1974) (police); *Matter of Greenwald v. Frank*, 70 Misc. 2d 632, aff'd 40 A.D.2d 717 (1972) (police); *cf. Anderson v. Laird*, 437 F.2d 912 (7th Cir. 1971) (National Guard); other courts, however, have rejected this view, *see Owen v. Barry*, 483 F.2d 1126 (2d Cir. 1973) (police); *Black v. Rizzo*, 360 F. Supp. 648 (E.D.Pa. 1973) (distinguishing between police and firemen). More recently, fire departments across the country have begun to justify hair regulations on the basis of safety considerations, in particular, the efficient use of gas masks. Though fundamentally a fact question, most courts have accepted this theory, *see Michino v. Rizzo*, 379 F. Supp. 837 (E.D.Pa. 1974), aff'd (3d Cir., decided March 24, 1975); *Hordorwich v. Bd. of Police and Fire Comm'rs*, 18 Ill. App.3d 20 (1974); *Manco v. Town of Irvington*, 126 N.J. Super. 148, 313 A.2d 219 (1973), aff'd, 64 N.J. 142, 313 A. 2d 204 (1974); *Olszewski v. Council, Fire Dept.*, 70 Misc. 2d 603 (1972). Only a few courts have found no basis for this justification, *see Lindquist v. City of Coral Gables*, 323 F. Supp. 1161 (S.D. Fla. 1971); *Hunt v. Bd. of Fire Comm'rs*, 68 Misc. 2d 261, 327 N.Y. S. 2d 36 (1971). In passing, we note but without holding that the challenged hair regulation, §51.133, does not appear to be co-extensive with the need for safe and efficient use of gas masks and, if that is the sole justification, might well be more narrowly drawn.

self-contained breathing apparatus, since hair prevented the wearer from obtaining a proper seal on the mask portion of the apparatus. Appellant disputed this, saying: "Boston and New York have men with long hair, beards and mustaches, and they are not concerned about it."

During the course of instruction, each member of the company was expected to don a mask and perform various activities, including walking up five floors of the training tower with the gas mask on, sealed, and functioning. Although it is unclear whether Lt. Muscare, as a senior officer, was required to participate in the training, it is clear that appellant did not put the apparatus on and Johnson had no direct knowledge of whether or not Lt. Muscare could obtain a proper seal. Appellant testified that he successfully tested the mask portion of the apparatus during the training and had never experienced any difficulty obtaining a satisfactory mask seal in the past.

After class, instructor Johnson discussed Muscare's conduct with Chief Prohaska, the drillmaster, and stated that he did not know whether Muscare, while wearing his goatee, could get a good seal on a face mask. Later that month, appellant's superior officer, Chief Morgan, warned him that he would not be permitted to continue working as a firefighter unless he shaved off his beard. A few days thereafter, appellant was informed that charges had been filed against him with the administrative authorities. Nothing more appears to have taken place in regard to this matter for two and one-half months. Then, on the morning of February 27, 1974, three of Lt. Muscare's superiors appeared at his duty station and announced that he was being suspended as of that moment and that he was to turn in his equipment and badge.

On March 4, 1974, the Chief of Personnel sent appellant a letter, informing him that he was being suspended for 29 days for alleged violations of §51.133 (hair regulation), §61.001 ("conduct unbecoming a member or employee of the Chicago Fire Department"), and §61.006 (disobedience of orders). The instant action

followed, attacking not only the constitutionality of the hair regulation, but also the summary suspension procedures employed by the Department.

Appellant urges that due process requires that some opportunity to respond to charges against him be made available to the government employee prior to disciplinary action against him. *See Hostrop v. Board of Junior College District No. 515*, 471 F.2d 488 (7th Cir. 1972), cert. den., 411 U.S. 935 (1973). The Department responds that due process was satisfied since appellant had actual notice of the charges against him and had a statutory right to a post-suspension hearing before the Civil Service Commission, which he failed to exercise. We conclude that post-suspension review is insufficient.

Section 10-1-18 of the Illinois Municipal Code (Ill. Rev. Stat. 1973, ch.24) provides in pertinent part as follows:

> § 10-1-18. *Removal — Suspension — Retirement*
>
> Except as hereinafter provided in this section, no officer or employee in the classified civil service of any municipality who is appointed under the rules and after examination, may be removed or discharged, or suspended for a period of more than 30 days, except for cause upon written charges and after an opportunity to be heard in his own defense. * * * Nothing in this Division 1 limits the power of any officer to suspend a subordinate for a reasonable period, not exceeding 30 days except that any employee or officer suspended for more than 5 days or suspended within 6 months after a previous suspension shall be entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension.

The Illinois Supreme Court recently had occasion to examine the constitutionality of summary suspension procedures used by the Chicago Police Department and concluded that the demands of due process were met by post-suspension review for suspensions of more than five days and less than 30 days. *Kropel v. Conlisk*, No. 45670 (Ill. S.Ct., decided January 30, 1975). That court, however, did not have the benefit of the United States

Supreme Court's recent decision in *Goss v. Lopez*, 95 S.Ct. 729 (1975). Though *Goss* is a "school" case, it nonetheless points the way to our resolution of the present case.

It can hardly be disputed that appellant, as a twenty-year veteran of the civil service, has a protected property interest in his employment, for "a state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process." 95 S.Ct. at 735. Nor can it be disputed that appellant's suspension for 29 days is not *de minimis*, and the "Court's view has been that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause." 95 S.Ct. at 737. It remains to answer the question what process is due, for in each situation the requirement is a flexible one.

As the Court has stated before and reaffirmed in *Goss*, "many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950). In the circumstances of America's high schools, the Court thought that notice, an explanation of the evidence the authorities have, and an opportunity to present his side of the story were sufficient to protect the student, and we think that at least this much is required in the circumstances of a public employee's suspension. Not only are alleged transgressions justifying suspension often more serious than school discipline problems, but the

corresponding penalties are potentially more damaging, for reputations, careers, and substantial amounts of lost pay are at stake.[3]

Public employees facing temporary suspension for less than 30 days have interests qualifying for protection under the Due Process Clause, and due process requires at the minimum that they be granted a hearing prior to suspension where they may be fully informed of the reasons for the proposed suspension and where they may challenge their sufficiency. Whether such persons should be granted the full panoply of rights envisioned in Ill. Rev. Stat., Ch. 24, § 10-1-18, for suspensions greater than 30 days is a question which we need not now address, since no hearing of any kind was accorded appellant prior to his suspension.[4]

---

[3] Here, appellant lost some $1,400 in pay during the 29-day suspension. Such a financial blow can be disastrous to many civil servants. As Judge Skelton noted in *Ricucci v. United States*, 425 F.2d 1252 (Ct.Cl. 1970):

> Few [government employees] earn more than enough to pay their living expenses from month to month, and when their salaries are cut off, they may be in the same destitute circumstances as a welfare recipient whose aid has been discontinued. [425 F.2d at 1257 (concurring opn.).]

[4] The Supreme Court's disposition of *Arnett v. Kennedy*, 416 U.S. 134 (1974), only confirms our analysis of the precise question presented here. There, the Court rejected a due process attack on the discharge of a federal civil servant who had been provided, pursuant to the Lloyd-LaFollette Act, a month's advanced notice of the reasons for his proposed discharge, the materials on which the notice is based, and the opportunity to appear personally before the official having the authority to make or recommend the final decision. Although a three-judge plurality expressed the view that the statute which established the employment property right also established the procedural safeguards to which the employee was entitled, two other Justices concurred in the result solely because they believed that the statute's provision of notice and an opportunity to be heard prior to discharge satisfied the

(Footnote continued on following page)

We do not think that the requirement of presuspension review will result in any unnecessary burden on the administration of public services, nor will it shackle administrators and prevent them from dealing with emergency disciplinary problems, for, as the District of Columbia once pointed out:

> In a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing. [R. A. Holman & Co. v. SEC, 299 F.2d 127, 131 (D. C. Cir.), cert. den., 370 U.S. 911 (1962).]

Here, we perceive no such justification for avoiding the requirement of a pre-suspension hearing. Even if we accept the Department's contention that the rationale behind its hair regulation is safety, a number of steps short of summary suspension are available to the Department pending a hearing on a violation of that regulation. Moreover, there is merit to appellant's comment in his brief that:

> The present case hardly presents an emergency requiring the Fire Department to act without any prior process, where the Fire Department utilized the services of Lt. Muscare for a period of over two months from the time in December of 1973 when he was initially reprimanded for wearing a goatee to the time he was suspended on February 27, 1974.

---

[4] *Continued*
minimal requirements of constitutional due process. In dissent, four other Justice would have gone further and required additional safeguards such as an impartial hearing examiner, the opportunity to present witnesses, and the right to conduct cross-examination. It can hardly be said, therefore, that *Arnett* stands for the proposition that, by accepting governmental employment, a civil servant is entitled only to such procedures as are provided by statute.

Accordingly, we reverse the judgment of the district court and remand for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

---

APPENDIX C

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

May 21, 1975

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED AND REMANDED, with costs, in accordance with the opinion of this court filed this date.

• Associate Justice Tom C. Clark, United States Supreme Court (Retired), sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

June 17, 1975

ORDER

In the petition for rehearing and suggestions for rehearing *en banc* or, in the alternative, for certification of questions of law to the Supreme Court filed in the above-entitled cause, it is suggested that there is a conflict between our decision and *Brubaker* v. *Board of Education, School District 149, Cook County, Ill.*, 502 F.2d 973 (7th Cir. 1975). We note that in *Brubaker* on rehearing *en banc* this court affirmed the district court judgment by an equally divided vote, 502 F.2d 1000, but failed to reinstate the panel opinion. In addition, *Goss* v. *Lopez,* 419 U.S. 565 (1975), which we decided was controlling in *Muscare,* came down after *Brubaker.*

On consideration of the petition and suggestions, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestions, and all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for rehearing in the above-entitled cause be and the same is hereby DENIED.

Supreme Court, U. S.
FILED
DEC 8 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-130

ROBERT J. QUINN, individually and as Commissioner of the Chicago Fire Department,

Petitioner,

vs.

FRANCIS MUSCARE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

Petition For Certiorari Filed July 24, 1975
Certiorari Granted October 14, 1975

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APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division.

No. 74 C 656

3-11-74—Filed complaint and copy (JS 5) $15.00

3-11-74—Filed Designation

3-11-74—Filed Affidavit regarding rule 39.

3-11-74—Filed Motion for a temporary restraining order.

3-11-74—Filed Memorandum in support of plaintiff's motion for a temporary restraining order.

3-11-74—Motion for a temporary restraining order is denied. Cause continued to March 19, 1974 at 2pm for hearing on preliminary injunction. McGarr, J.

3-19-74—Filed defendant's appearance and that of his attorney.

3-19-74—Filed Motion in opposition to the granting of preliminary injunction.

3-19-74—Cause called for hearing on preliminary injunction. Plaintiff rests on the complaint. Evidence heard for defendant. Defendant rests. Rebuttal evidence heard and concluded. Surrebuttal evidence heard and concluded. Court enters its findings of fact and conclusions of law from the bench. Mo-

tion for preliminary injunction is denied. Cause continued to March 26, 1974 at 10am for status report. McGarr,J.

3-26-74—Motion of Plaintiff for reconsideration and for amendment of judgment is taken under advisement. Cause continued to March 29, 1974 at 10 A.M. for ruling on plaintiffs motion to reconsider previous ruling and further status report.—McGarr,J

3-19-74—Filed summons returned served.

3-26-74—Filed Plaintiff's Motion for Amendment of judgment.

3-26-74—Filed Memorandum in support of plaintiff's motion for reconsideration.

3-29-74 Plaintiffs motion for reconsideration and motion for amendment of judgment, are both denied. Plaintiff's motion for a preliminary injunction will be considered as a motion for a permanent injunction without further hearing and is denied. McGarr,J.

4-4-74—Clerk's file copy of Excerpt of proceedings had on March 19, 1974, before Judge McGarr, filed by an official court reporter." ds

4-26-74—Filed Plaintiff's Notice of appeal. P

5-9-74—"Clerk's file copy of transcript of proceedings had on March 19, 1974 before Judge McGarr, filed by an official court reporter." ds

5-15-74—Filed Plaintiff's Designation for the Complete Record. ds

5-29-74—Filed Plaintiff's Exhibit 1 and 2. (Identified on attached list) Y

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 74-1460

6-7-74—Record on appeal filed.

8-1-74—Appellant's brief and appendix filed.

10-15-74—Appellee's brief filed.

11-15-74—Appellant's reply brief filed.

1-16-75—Oral Argument heard. Cause taken under advisement.

5-21-75—Judgment order entered, reversing and remanding to District Court with directions. Per curiam opinion filed.

6-17-75—Petition for rehearing denied.

6-24-75—Order entered staying mandate until July 24, 1975.

7-31-75—Mandate issued.

8-11-75—Order entered recalling mandate.

IN THE SUPREME COURT OF THE UNITED STATES

No. 75-130

7-24-75—Petition for certiorari filed by defendant.

10-14-75—Order entered granting certiorari.

IN THE UNITED STATES DISTRICT COURT
Northern District Of Illinois
Eastern Division

FRANCIS MUSCARE,
Plaintiff,

vs.

ROBERT J. QUINN, individually and as Commissioner, Chicago Fire Department,
Defendant.

No. 74C 656
Civil Action

COMPLAINT
(Filed March 11, 1974)

1. This is an action by Plaintiff seeking to enjoin the Chicago Fire Department from continuing his suspension from his duties for alleged violations of §§61.001, 61.006 and 51.133, of the Rules and Regulations of the Chicago Fire Department; for declaratory judgment that §§61.001 and 51.133 are unconstitutional on their face, that §61.006 is unconstitutional as applied to Plaintiff in this case, and that procedures of the Chicago Fire Department under which Plaintiff was suspended are unconstitutional; and for back pay for the period of wrongful suspension.

2. This Court has jurisdiction under 28 U.S.C. §1343, to enforce rights guaranteed by 42 U.S.C. §1983, and under 28 U.S.C. §2201, *et seq.*, and the Constitution of the United States.

3. Defendant Robert J. Quinn is Commissioner of the Chicago Fire Department and exercises sole and exclusive control and management of the Fire Department and its

personnel. [Municipal Code of the City of Chicago, Ch. 12, §4].

4. Plaintiff Francis Muscare has been a member of the Chicago Fire Department since 1955. He currently holds the rank of Lieutenant. Plaintiff wears a small mustache and short goatee. His hair is trimmed to medium length.

5. In December, 1973, Plaintiff's superior officer, Chief Morgan, warned him that he would not be permitted to continue working as a fire fighter unless he shaved his beard off. A few days thereafter Plaintiff was informed that charges had been filed against him with the administration authorities of the Fire Department.

6. Two and one-half months later, on Wednesday, February 27, 1974, at 11:30 A.M., Second Deputy Lattice, Third Division Fire Marshall Callahan and Third Battalion Chief Swoboda entered the fire station where Lt. Muscare was performing his duties as a fire fighter and ordered him to turn in his equipment because he was being suspended effective immediately. Plaintiff was informed that he would receive a letter detailing the charges against him.

7. The appearance of Plaintiff's face and the trim of his hair has remained essentially the same from October, 1973, to the present. Photographs of Plaintiff taken March 1, 1974 and reflecting his appearance since October, 1973 and as of the date of Plaintiff's suspension, are attached hereto as Exhibits "A" and "B" and made a part hereof.

8. On March 4, 1974, Plaintiff received a letter bearing the signature of Walter R. Braun, Chief of Personnel, informing him that he was accused of violating §§61.001, 61.006 and 51.133 of the Chicago Fire Department Rules and Regulations and that his suspension was to last twenty-nine days, beginning February 27, 1974. A copy of the letter from Walter R. Braun is attached hereto as Exhibit "C" and made a part hereof.

9. Section 51.133 of the Rules and Regulations of the Chicago Fire Department provides as follows:

> Section 51.133. Proper Personal Appearance. All members of the Chicago Fire Department shall present a clean and proper appearance in personal care and attire at all times. The face shall be clean-shaven, except that a non-eccentric mustache is permissible. Mustaches shall not extend beyond a line perpendicular to the corner of the mouth and the full upper lip must be readily visible.
>
> Sideburns shall be trimmed short and shall be no lower than a line from the middle of the ear.
>
> Hair shall be worn neatly and closely trimmed, and the hair outline shall follow the contour of the ear and slope to the back of the neck. It will be gradually tapered overall, in order to present a neat appearance.

A copy of §51.133 of the Rules and Regulations of the Chicago Fire Department is attached hereto as Exhibit "D" and made a part hereof.

10. Section 61.001 of the Rules and Regulations of the Chicago Fire Department provides as follows:

Part VI
OFFENSES, PROCEDURES, AND PENALTIES IN RESPECT TO VIOLATIONS OF THE RULES AND REGULATIONS, PRACTICES AND PROCEDURES OF THE CHICAGO FIRE DEPARTMENT

• • •

OFFENSES

> Section 61.001. Conduct Unbecoming a Member or Employee of the Chicago Fire Department.

A copy of §61.001 of the Rules and Regulations of the Chicago Fire Department is attached hereto as Exhibit "E" and made a part hereof.

11. Section 61.006 of the Rules and Regulations of the Chicago Fire Department provides as follows:

Part VI
OFFENSES, PROCEDURES, AND PENALTIES IN RESPECT TO VIOLATIONS OF THE RULES AND REGULATIONS, PRACTICES AND PROCEDURES OF THE CHICAGO FIRE DEPARTMENT

• • •

OFFENSES

> Section 61.006. Disobedience of Orders.

A copy of §61.006 of the Rules and Regulations of the Chicago Fire Department is attached hereto as Exhibit "F" and made a part hereof.

12. The twenty-nine day suspension of Plaintiff, a fire fighter of twenty years' service, without any prior notice or opportunity for a hearing, is a violation of Plaintiff's right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

13. Section 51.133 of the Rules and Regulations of the Chicago Fire Department on its face prohibits Plaintiff Muscare from determining the details of his personal appearance and violates Plaintiff's Constitutional rights to personal freedom guaranteed by the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

14. Section 61.001 of the Rules and Regulations of the Chicago Fire Department, creating the offense of "Conduct unbecoming a member or employee of the Chicago Fire Department," is so vague as not to give notice of the conduct it prohibits, depriving Plaintiff of his right to due process under the Fourteenth Amendment to the United States Constitution, and is so overbroad as to infringe upon Plaintiff's Constitutionally protected right to personal freedom.

15. Insofar as §61.006, creating the offense of "Disobedience of Orders," is applied by the Fire Department to punish Plaintiff for the alleged violation of orders issued under §§51.133 and 61.001, such orders were unconstitutional and void, and as applied in this case, §61.006 is unconstitutional.

16. The suspension of Plaintiff has deprived him of his employment and the earnings used to sustain himself and his family, has stigmatized him in his career as a fire fighter and jeopardized his future ability to earn a living in his chosen work. Unless Plaintiff foregoes his Constitutional rights, he will be subject to continued disciplinary actions which will perpetuate the injury. This action of suspending Plaintiff has thus caused and is continuing to cause him to suffer immediate, irreparable injury.

17. If Defendant is enjoined from continuing the suspension or taking any other disciplinary action against Plaintiff for the alleged violations of §51.133, §61.001 and, in this case, for alleged violation of §61.006, Defendant would not be harmed thereby.

Wherefore, Plaintiff respectfully asks this Court:

1. For a declaratory judgment that: (a) §51.133 and §61.001 of the Rules and Regulations of the Chicago Fire Department are unconstitutional on their face and void; and (b) §61.006 of the Rules and Regulations of the Chicago Fire Department is unconstitutional as applied to Plaintiff in this case; and (c) the suspension of Plaintiff without a hearing or an opportunity to defend himself is unconstitutional; and

2. To enjoin Defendant and any of his agents, employees, officers, lawyers, representatives and servants, preliminarily and permanently from enforcing §§61.001 and 51.133, and, insofar as related to orders issued under the aforementioned, §61.006 of the Rules and Regulations of the Chicago Fire Department against Plaintiff by means of suspension from duty or any other means; and

3. For back pay to which Plaintiff would have been entitled if he had not been wrongfully suspended in violation of his rights under the United States Constitution.

/s/ Francis Muscare
Plaintiff
/s/ Robert S. Sugarman
/s/ Linda R. Hirshman
Counsel for Plaintiff

(Affidavit of Francis Muscare).

EXHIBIT "A"

EXHIBIT "B"

EXHIBIT "C"

(Letterhead Of)
Chicago Fire Department
FIRE ACADEMY
February 28, 1974

Lieutenant Frank Muscare
4059 West Barry
Chicago, Illinois 60641

Subject: Suspension

Sir:

You are hereby notified that you have been, or will be, removed from the payroll of the Chicago Fire Department for violations of the Rules and Regulations, Practices and Procedures of the Chicago Fire Department.

Recommended Duration of Suspension: twenty-nine (29) days.

Dates of suspension:
From: 0800 February 27, 1974
To: 0800 March 28, 1974

You are accused of violations of the following sections of the rules:

Sections: 61.001-61.006 and 51.133

1. You will report to the Personnel Department on March 27, 1974 to pick up your badge and other City property assigned to you, and to receive further orders.
2. This suspension does not preclude the filing of these charges against you by the Civil Service Commission. Unless previously notified you will contact the Chief of Personnel on ..... to find out the disposition of your case.

By order of
/s/ Walter R. Braun
Chief of Personnel

cc: 3rd Division Marshal

EXHIBIT "D"

Section 51.131. *Use of Vending Machines in Fire Stations.* The vending machines, dispensing soft drinks and candy, located in fire stations are for the use of Fire Department personnel only. Under no circumstances will other persons be allowed to use the facilities or products dispensed by these vending machines. Cigarette vending machines are not permitted in fire stations.

Section 51.132. *Time Off Due to a Death in the Family.* Time off duty (one work day off) may be granted to all members of the Chicago Fire Department when a death occurs in the immediate family of the member. Immediate family is defined as consisting of mother, father, husband, wife, brother, or sister (including step or half) son or daughter (including step or half) father-in-law, mother-in-law, daughter-in-law, son-in-law, grand parents and grandchildren.

When someone in the "immediate family" dies, the member will notify his immediate superior officer by telephone and give all the pertinent information. The superior officer will then relay the information through the chain of command so that sufficient manpower can be maintained.

Section 51.133. *Proper Personal Appearance.* All members of the Chicago Fire Department shall present a clean and proper appearance in personal care and attire at all times. The face shall be clean-shaven, except that a non-eccentric mustache is permissible. Mustaches shall not extend beyond a line perpendicular to the corner of the mouth and the full upper lip must be readily visible.

Sideburns shall be trimmed short and shall be no lower than a line from the middle of the ear.

Hair shall be worn neatly and closely trimmed, and the hair outline shall follow the contour of the ear and slope to the back of the neck. It will be gradually tapered overall, in order to present a neat appearance.

EXHIBITS "E" AND "F"

Part VI.

OFFENSES, PROCEDURES, AND PENALTIES IN RESPECT TO VIOLATIONS OF THE RULES AND REGULATIONS, PRACTICES AND PROCEDURES OF THE CHICAGO FIRE DEPARTMENT

Members or other employees who shall be found guilty of infractions of any of the Rules and Regulations, Practices and Procedures of the Fire Department, shall be subject to the penalties hereinafter enumerated.

OFFENSES

Section 61.000

Section 61.001. Conduct unbecoming a member or employee of the Chicago Fire Department.

Section 61.002. Intoxication.

Section 61.003. Keeping or drinking intoxicating liquors in or about premises of the Fire Department.

Section 61.004. Entering any tavern or bar while on duty, or in uniform, except in the performance of assigned duty.

Section 61.005. Neglect of duty.

Section 61.006. Disobedience of orders.

Section 61.007. Inattention to duty.

Section 61.008. Immoral conduct.

Section 61.009. Making a false official report.

Section 61.010. Reporting for duty while incapable of performing duties without a proper medical reason.

Section 61.011. Absence from duty without permission.

Section 61.012. Leaving a post of duty without being properly relieved or without proper authorization.

Section 61.013. Violation of any law or ordinance.

Section 61.014. Insubordination or disrespect toward a superior officer.

Section 61.015. Using coarse, profane or insolent language or showing disrespect to, or willful maltreatment toward any member of the department or any other person.

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

DESIGNATION FORM—CIVIL

(Filed March 11, 1974)

A. Pending Related Cause, If Any:
Number .....; Judge .....
Reason case deemed related (indicate by (X)):
1. ( ) Involves property included in earlier numbered pending cause.
2. ( ) Involves same issue of fact or grows out of same transaction as earlier numbered pending suit.
3. ( ) Involves validity or infringement of a patent already in suit in earlier numbered pending suit.
4. ( ) Involves both the same issue of law and the same class as a pending suit and is brought as a class action.

B. Indicate Basis Of Jurisdiction By (X):
1. ( ) United States is plaintiff or defendant.
2. (X) Federal question.
3. ( ) Diversity of citizenship.

C. Category Of Case (see reverse side of this form for list of categories):
Civil Rights—Federal Question

D. Is This Suit Brought As A Class Action?
( ) Yes (X) No

• • • • •

/s/ Linda R. Hirshman
Attorney at Law

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

AFFIDAVIT EVIDENCING COMPLIANCE WITH GENERAL RULE 39
(Filed March 11, 1974)

Affiant is the attorney of record for Francis Muscare and has knowledge of the matters covered by this affidavit and has read General Rule 39.

Affiant has not directly or indirectly solicited employment by the above-named party or parties, and knows of no solicitation of said party or parties by any person that has resulted in the employment of the affiant, except (here state all exceptions, or if none state "no exception"): No Exceptions

Affiant has not paid, or promised to pay, and knows of no payment or promise of payment to the above-named party, or parties, of the costs of this case, or of the medical, living of other expenses of any party, or of any part of an attorney's fee, or of any portion of the recovery by suit or settlement herein to any person whatever other than the above-named party or parties and the attorneys of record herein, except (here state all exceptions, or if none state "no exception"): No exceptions

Affiant has filed contemporaneously herewith a signed copy of any written contingent fee agreement applicable to his compensation for representing the above-named party or parties in this action and represents that a signed copy thereof has been furnished to each party whom he represents; if no copy of a contingent fee agreement is filed herewith, affiant represents that his compensation for services in this case is not on a contingent basis.

/s/ Linda R. Hirshman
Affiant

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

MOTION FOR A TEMPORARY RESTRAINING ORDER
(Filed March 11, 1974)

Plaintiff Francis Muscare, by his counsel Robert S. Sugarman and Linda R. Hirshman of Jacobs, Gore, Burns & Sugarman, moves this Court pursuant to Rule 65(b), Federal Rules of Civil Procedure, for a temporary restraining order restraining Defendant in the above captioned case from continuing suspending him under the provisions of §§61.001, 61.006 and 51.133 of the Rules and Regulations of the Chicago Fire Department, for the following reasons:

1. That Plaintiff has filed in this Court a Complaint against the Defendant praying for a declaratory judgment that §§61.001, 61.006 and 51.133 of the Rules and Regulations of the Chicago Fire Department and his suspension under those sections without a hearing and opportunity to defend is unconstitutional and void; a preliminary and permanent injunction against the enforcement of §§61.001, 51.133 and, as applied in this matter, §61.006, of the Rules and Regulations of the Chicago Fire Department, and for back pay for the period of Plaintiff's suspension. The allegations of that Complaint are incorporated herein by reference and made a part hereof.

2. That Defendant has not yet filed his Answer to said Complaint but that, nevertheless, the material allegations of that Complaint are true, and Plaintiff will be able to substantiate the same by sufficient and competent evidence.

3. That the suspension of Plaintiff is causing him immediate and irreparable injury by depriving him of his employment and the earnings used to sustain himself and his

family, stigmatizing him in his career, and jeopardizing his future ability to earn a living as a fire fighter, and if an injunction would be entered as prayed for in the Complaint only after notice upon Defendant and a hearing, Plaintiff will suffer continuing immediate and irreparable injury.

4. That if a temporary restraining order would be entered, Defendant would not be harmed thereby.

Wherefore, Plaintiff requests that a temporary restraining order be entered, without bond, restraining Defendant and any of his agents, employees, officers, lawyers, representatives and services, from suspension of Plaintiff under the provisions of §61.001 and §51.133, and, insofar as related to orders issued under the aforementioned, §61.006 of the Rules and Regulations of the Chicago Fire Department and from taking any disciplinary action against him, pending further order by this Court; and for such other and further relief as this Court may deem just.

Respectfully submitted,
/s/ Robert S. Sugarman
/s/ Linda R. Hirshman
Counsel for Plaintiff

State Of Illinois
County Of Cook—ss.

AFFIDAVIT

Affiant Francis Muscare, being first duly sworn on oath, deposes and states as follows:

1. He has been a member of the Chicago Fire Department since 1955, currently holding the rank of Lieutenant.

2. He has worn a small mustache, a short goatee, and hair trimmed to medium length, as he presently appears, since October, 1973.

3. In December, 1973, his superior officer, Chief Morgan, instructed him to shave his goatee off and, when he declined to do so, was shortly thereafter informed that charges had been filed against him with the administration of the Chicago Fire Department.

4. On February 27, 1974, while he was performing his duties as a fire fighter, Second Deputy Lattice, Third Division Fire Marshall Callahan and Third Battalion Chief Swoboda of the Chicago Fire Department ordered him to turn in his fire equipment and leave the fire station where he was on duty, because he was being suspended from duty as a fire fighter, effective immediately.

5. On March 4, 1974, he received a letter signed by Walter R. Braun, Chief of Personnel, informing him that he was being suspended from duty until March 28, 1974 for alleged violation of §§61.001, 61.006 and 51.133 of the Rules and Regulations of the Chicago Fire Department. A copy of said letter is hereto attached as Exhibit "A" and made a part hereof. Copies of §61.001, §61.006 and §51.133 of the Rules and Regulations of the Chicago Fire Department are hereto attached as Exhibits "B", "C," and "D," respectively and made a part hereof.

6. Affiant was afforded no hearing or opportunity to defend himself before his suspension.

7. Affiant is currently being deprived of the earnings used to sustain himself and his family, the opportunity to perform his duties as a fire fighter with the Chicago Fire Department, and present and future ability to pursue his chosen career.

8. This action by the Defendant suspending Affiant from his position as a fire fighter with the Chicago Fire Department is causing Affiant to suffer, and will continue to cause immediate, irreparable injury to the Affiant.

Further Affiant Sayeth Not.

/s/ Francis Muscare

EXHIBIT "A"

(Letterhead Of)
Chicago Fire Department
FIRE ACADEMY

February 28, 1974

Lieutenant Frank Muscare
4059 West Barry
Chicago, Illinois 60641

Subject: Suspension

Sir:

You are hereby notified that you have been, or will be, removed from the payroll of the Chicago Fire Department for violations of the Rules and Regulations, Practices and Procedures of the Chicago Fire Department.

Recommended Duration of Suspension: twenty-nine (29) days.

Dates of suspension:

From: 0800 February 27, 1974
To: 0800 March 28, 1974

You are accused of violations of the following sections of the rules:

Sections: 61.001-61.006 and 51.133

1. You will report to the Personnel Department on March 27, 1974 to pick up your badge and other City property assigned to you, and to receive further orders.
2. This suspension does not preclude the filing of these charges against you by the Civil Service Commission. Unless previously notified you will contact the Chief of Personnel on ..... to find out the disposition of your case.

By order of
/s/ Walter R. Braun
Chief of Personnel

cc: 3rd Division Marshal

EXHIBITS "B" AND "C"

Part VI.

OFFENSES, PROCEDURES, AND PENALTIES IN RESPECT TO VIOLATIONS OF THE RULES AND REGULATIONS, PRACTICES AND PROCEDURES OF THE CHICAGO FIRE DEPARTMENT

Members or other employees who shall be found guilty of infractions of any of the Rules and Regulations, Practices and Procedures of the Fire Department, shall be subject to the penalties hereinafter enumerated.

OFFENSES

Section 61.000

Section 61.001. Conduct unbecoming a member or employee of the Chicago Fire Department.

Section 61.002. Intoxication.

Section 61.003. Keeping or drinking intoxicating liquors in or about premises of the Fire Department.

Section 61.004. Entering any tavern or bar while on duty, or in uniform, except in the performance of assigned duty.

Section 61.005. Neglect of duty.

Section 61.006. Disobedience of orders.

Section 61.007. Inattention to duty.

Section 61.008. Immoral conduct.

Section 61.009. Making a false official report.

Section 61.010. Reporting for duty while incapable of performing duties without a proper medical reason.

Section 61.011. Absence from duty without permission.

Section 61.012. Leaving a post of duty without being properly relieved or without proper authorization.

Section 61.013. Violation of any law or ordinance.

Section 61.014. Insubordination or disrespect toward a superior officer.

Section 61.015. Using coarse, profane or insolent language or showing disrespect to, or willful maltreatment toward any member of the department or any other person.

EXHIBIT "D"

Section 51.131. *Use of Vending Machines in Fire Stations.* The vending machines, dispensing soft drinks and candy, located in fire stations are for the use of Fire Department personnel only. Under no circumstances will other persons be allowed to use the facilities or products dispensed by these vending machines. Cigarette vending machines are not permitted in fire stations.

Section 51.132. *Time Off Due to a Death in the Family.* Time off duty (one work day off) may be granted to all members of the Chicago Fire Department when a death occurs in the immediate family of the member. Immediate family is defined as consisting of mother, father, husband, wife, brother, or sister (including step or half) son or daughter (including step or half) father-in-law, mother-in-law, daughter-in-law, son-in-law, grand parents and grandchildren.

When someone in the "immediate family" dies, the member will notify his immediate superior officer by telephone and give all the pertinent information. The superior officer will then relay the information through the chain of command so that sufficient manpower can be maintained.

Section 51.133. *Proper Personal Appearance.* All members of the Chicago Fire Department shall present a clean and proper appearance in personal care and attire at all times. The face shall be clean-shaven, except that a non-eccentric mustache is permissible. Mustaches shall not extend beyond a line perpendicular to the corner of the mouth and the full upper lip must be readily visible.

Sideburns shall be trimmed short and shall be no lower than a line from the middle of the ear.

Hair shall be worn neatly and closely trimmed, and the hair outline shall follow the contour of the ear and slope to the back of the neck. It will be gradually tapered overall, in order to present a neat appearance.

CERTIFICATE OF ATTORNEY

I, Linda R. Hirshman, one of the attorneys for Plaintiff Francis Muscare, Do Hereby Certify that on March 11, 1974, I attempted to give notice of this motion for a temporary restraining order to the named Defendant by telephoning him and the Corporation Counsel of the City of Chicago personally at their official places of business and advising them of the filing of this motion.

/s/ Linda R. Hirshman
Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

(Filed March 11, 1974)

I.

FACTS

Plaintiff in this action, Francis Muscare, has been a fire fighter with the Chicago Fire Department since 1955. On February 27, 1974, while Plaintiff was performing his duties as a fire fighter at his fire station, three of his superior officers, Second Deputy Lattice, Third Division Fire Marshall Callahan, and Third Battalion Chief Swoboda, presented themselves at Plaintiff's station and informed him that he was being suspended as of that moment, to turn in his equipment and identification. On Monday, March 4, 1974, Lieutenant Muscare received a letter signed by Walter R. Braun, Chief of Personnel, informing him that

he was being suspended for a period of twenty-nine days from February 27, 1974, for alleged violations of §§61.001, 61.006 and 51.133 of the Rules and Regulations of the Chicago Fire Department.

Section 51.133 of the Rules and Regulations of the Chicage Fire Department provides:

> Section 51.133. Proper Personal Appearance.
> All members of the Chicago Fire Department shall present a clean and proper appearance in personal care and attire at all times. The face shall be clean-shaven, except that a non-eccentric mustache is permissible. Mustaches shall not extend beyond a line perpendicular to the corner of the mouth and the full upper lip must be readily visible.
> Sideburns shall be trimmed short and shall be no lower than a line from the middle of the ear.
> Hair shall be worn neatly and closely trimmed, and the hair outline shall follow the contour of the ear and slope to the back of the neck. It will be gradually tapered overall in order to present a neat appearance.

Section 61.001 of the Rules and Regulations of the Chicago Fire Department creates the offense of "conduct unbecoming a member or employee of the Chicago Fire Department" and Section 61.006 of the Rules and Regulations of the Chicago Fire Department creates the offense of "disobedience of orders."

Since October, 1973, Lt. Muscare has worn a small mustache and a short, neatly-trimmed goatee. His hair is medium in length. Plaintiff's facial appearance and the length of his hair has remained essentially the same from October, 1973 to the present. In December, 1973, one of Lt. Muscare's superior officers, Chief Morgan, informed him that he could not work with a goatee and shortly thereafter, Morgan advised Plaintiff that charges had been filed against him. However, it was not until February 27, 1974 that any further action was taken against him.

Lt. Muscare was then suspended from duty without pay, with the prospect of further disciplinary action if he did not conform his personal appearance to the dictates of the Chicago Fire Department.

Plaintiff has been and is continuing to be deprived of his income, his chosen work, and his reputation as a fire fighter by a summary procedure of the Chicago Fire Department enforcing regulations which infringe upon his Constitutional right to determine his personal appearance as he chooses, and the suspension of Lt. Muscare can only be conceived as an initial step in long-range disciplinary measures aimed at forcing him to conform his appearance to the dictates of the administration of the Chicago Fire Department.

II.

JURISDICTION

This Court has jurisdiction to redress the deprivation of Plaintiff's Constitutional rights protected by 42 U.S.C. §1983, under 28 U.S.C. §1343 and 28 U.S.C. §2201, *et seq.* The Court also has jurisdiction over actions arising directly under the United States Constitution itself. *Bell* v. *Hood,* 327 U.S. 678, 66 S.Ct. 773 (1946).

III.

ARGUMENT

A. Section 51.133 of the Rules and Regulations of the Chicago Fire Department is an Unconstitutional Deprivation of Plaintiff's Right to Determine His Personal Appearance.

Plaintiff's right to determine the details of his personal appearance free from arbitrary governmental interference is protected by the United States Constitution. The Fire Department may not condition Plaintiff's employment upon

the requirement that he yield up this right. The United States Court of Appeals for the Seventh Circuit specifically set out the Constitutional protections for the right to determine one's appearance, particularly with regard to length of hair, in *Breen* v. *Kahl,* 419 F.2d 1034 (7 Cir. 1969):

> The right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution . . . whether this right is designated as within the 'penumbras' of the First Amendment freedom of speech, see *Griswold* v. *Connecticut,* 331 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), or as encompassed within the Ninth Amendment as an 'additional fundamental right . . . which exists alongside those fundamental rights specifically mentioned in the first eight constitutional Amendments" [cite *Griswold*], it clearly exists and is applicable to the states through the due process clause of the Fourteenth Amendment.
> [419 F.2d at 1037].

In light of the Constitutional protections for this self-determination, the Court of Appeals struck down as unconstitutional a high school regulation prescribing the length and appearance of hair for male students. Since the decision in *Breen* v. *Kahl,* both the Court of Appeals and the District Court have consistently reiterated their commitment to protect the right of the individual to decide what the length and style of his hair will be. *Arnold* v. *Carpenter,* 459 F.2d 939 (7 Cir. 1972), *Crews* v. *Cloncs,* 432 F.2d 1259 (7 Cir. 1970), *Copeland* v. *Hawkins,* 352 F.Supp. 1022 (E.D.Ill., 1973).

The Constitutional protection of freedom to determine one's personal appearance protects public employees from the enforcement of officially imposed standards. Absent the showing of a compelling governmental interest of the most serious nature, public employers may not dictate to their employees the way in which they must groom themselves:

> It is now clearly established that the State does not possess an absolute right arbitrarily to refuse opportunities such as . . . employment in public service . . . [*Crews* v. *Cloncs,* 432 F.2d at 1263, *supra*].

This protection was specifically applied to a fireman in 1971, in *Hunt* v. *Board of Fire Commissioners of Massapequa Fire District,* 327 N.Y.S.2d 36 (Sup.Ct. 1971), where the New York Court struck down a fireman's suspension for violation of a grooming regulation, holding:

> "there is as a matter of substantive due process a constitutional right to determine one's own hair style and . . . the burden is upon the Board to show substantial justification for the regulation it seeks to impose.
> [327 N.Y.S. at 45].

Similarly, in the case of *Lindquist* v. *City of Coral Gables,* 323 F.Supp. 1161 (S.D.Fla. 1971), the Federal District Court for the Southern District of Florida ordered the Coral Gables Fire Department to reinstate with back pay a fireman who had been suspended for violation of hair regulations substantially similar to the ones involved in the case at hand. Recently, in *Black* v. *Rizzo,* 360 F.Supp. 648 (E.D. Pa. 1973) the District Court for the Eastern District of Pennsylvania reiterated a fireman's right to determine his personal appearance despite regulations almost identical to those of the Chicago Fire Department and reinstated the fireman with back pay. The Pennsylvania District Court, after a survey of the substantial body of law that has evolved around this subject, concluded that:

> Among other things, the plaintiff has argued that his interest in wearing his hair in a style, manner, and length of his choosing constitutes a Constitutional right implicitly protected by the "liberty" assurance of the Due Process Clause of the Fourteenth Amendment [cites] . . . The Court is satisfied that the plaintiff has demonstrated the existence of such a constitutionally protected interest.
> [360 F.Supp. at 651].

The Court in *Black* v. *Rizzo* definitively rejected the argument that interference with that right could be justified on grounds of a fire department's disciplinary interest in regulating the activities of its members. The United States Court of Appeals for the Second Circuit recently ruled that even the unique public function of a Department of Police does not justify the interference with a policeman's right to determine his personal appearance, specifically with regard to the style of his hair. *Dwen* v. *Barry,* 483 F.2d 1126 (2 Cir. 1973).

Section 51.133 of the Rules and Regulations of the Chicago Fire Department reveals its constitutional infirmity on its face. Without setting forth any reason for the rule, the Fire Department has simply created a requirement that its members present a "proper appearance in personal care and attire." The standards of §51.133, including, for example, "non-eccentric mustaches" can only be based on some administrative officer's subjective aesthetic preference. This patent attempt to impose the personal preferences of administration of the Chicago Fire Department upon the members of the Department is a violation of the members' Constitutional rights and cannot be sustained. Such official attempts to dictate the details of personal appearance have been prohibited again and again by the United States District Courts and Courts of Appeals, including the Court of Appeals for the Seventh Circuit. This attempt once again to impose an official standard of appearance is directly counter to what is now a well-settled body of case law. There can be no doubt that Plaintiff will ultimately prevail on the merits of his claim, and the injury he is now suffering for his exercise of his clear Constitutional rights is illegal, irreparable and unjustifiable.

B. Continued Suspension of Plaintiff and the Likelihood of Additional Action Against Him is Causing and Will Cause Additional Immediate, Irreparable Injury to Plaintiff, and Restraint of Plaintiff's Suspension will not Harm Defendant.

By action of the Chicago Fire Department on February 27, 1974, Lt. Francis Muscare was summarily ordered off the premises of his employment and suspended from active service with the Chicago Fire Department. Under the terms of his suspension, as described in the Fire Department's letter of February 28, 1974, Lt. Muscare can only anticipate further disciplinary action being taken against him if he continues to exercise his Constitutional rights in violation of the Rules and Regulations of the Chicago Fire Department dictating the details of his personal appearance. By its action suspending Lt. Muscare, the Chicago Fire Department has deprived and is continuing to deprive him of the earnings currently used to support himself and his family, the opportunity to pursue his career as a fire fighter, his reputation in the community, and his prospects for future successful pursuit of his chosen career. Plaintiff is thus suffering extensive, immediate, ongoing, irreparable injury every day that he remains excluded from the fulfillment of his chosen work, and he has no reasonable anticipation that the penalties currently being imposed upon him will be mitigated in the future unless he yields his Constitutional rights to the Fire Department. Unless this Court acts to remedy Plaintiff's position immediately, he will be irreparably injured.

Lt. Muscare has been performing as a fire fighter with his personal appearance essentially the same as it is at this moment since at least October, 1973. Nothing in the Rules and Regulations of the Chicago Fire Department indicates that any harm would come to the Department if he were to continue to do so. By contrast to the injury which Lt. Muscare has suffered and is continuing to suffer, his rein-

statement as a fire fighter will not harm Defendant in any substantial manner. Indeed, unless the Chicago Fire Department is employing superfluous fire fighters, one must assume that Lt. Muscare's suspension for twenty-nine days, if anything, actually harms the Fire Department by depriving them of a qualified and experienced fire fighter, for no substantial reason. Since the Chicago Fire Department had been aware of Lt. Muscare's appearance since at least last December, it is inconceivable that his appearance created a crisis of such urgent nature to warrant action against him without any of the Constitutionally required procedures for action against him.

C. Section 61.001 of the Rules and Regulations of the Chicago Fire Department is Unconstitutionally Vague and Overbroad.

Section 61.001 of the Rules and Regulations of the Chicago Fire Department creates an offense denominated "Conduct unbecoming a member or employee of the Chicago Fire Department." This prohibition is so general as to be incapable of a reasoned interpretation in advance of its application. Further, the wide scope of activities which may be interpreted as "conduct unbecoming" a fire fighter encompasses both Constitutionally protected activities and those which may be beyond such protections, and thus the regulation contains the potential for infringement upon Constitutional rights. Such sweeping regulations are a violation of Constitutional standards and must be replaced by more narrowly drawn rules. *Shelton* v. *Tucker,* 364 U.S. 479 (1960).

Absent any definition of conduct unbecoming a member of the Chicago Fire Department, §61.001 is simply what the administrators of the Fire Department say it will be in any given case. The person unfortunate enough to come

within the purview of this section cannot predict what his offenses may be. Such a rule violates the very fundamentals of due process of law and chills the exercise of Constitutionally protected rights.

In *Soglin* v. *Kauffman,* 418 F.2d 163 (7 Cir. 1969), the United States Court of Appeals for the Seventh Circuit ruled that a university could not undertake disciplinary proceedings for violation of a rule proscribing "misconduct" on the grounds that such proceedings were not based on "standards of conduct expressed in reasonably clear and narrow rules." [418 F.2d at 167] The Court stated:

> The use of 'misconduct' as a standard in imposing the penalties threatened here must therefore fall for vagueness. The inadequacy of the rule is apparent on its face. It contains no clues which could assist a student, an administrator or a reviewing judge in determining whether conduct not transgressing statutes is susceptible to punishment by the University as 'misconduct'.

Here, also the inadequacy of §61.001 is apparent on its face. The impossibility of predicting what administrators will determine to be "conduct unbecoming" is obvious. The members and employees of the Chicago Fire Department may not be forced to guess at what behavior will bring the penalty of suspension or other discipline upon them any more than any other citizen must be forced to guess at what behavior will provoke the wrath of an unpredictable government. The Constitutional infirmity of §61.001 is particularly offensive because as in the instant case it can be interpreted to prohibit conduct protected by the Constitution.

Even the military are restrained from ordering their internal affairs through means such as sweeping and vague regulations. In *Avrech* v. *Secretary of Navy,* 477 F.2d 1237 (D.C. Cir. 1973), the United States Court of Appeals for

the District of Columbia Circuit struck down as unconstitutional a conviction under Article 134 of the Uniform Code of Military Justice which provided:

> All disorders and neglect to the prejudice of good order and discipline in the Armed Forces, all conduct of a nature to bring discredit upon the Armed Forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court martial, according to the nature and degree of the offense and shall be punished at the discretion of that court.
> [477 F.2d 1237 at 1239].

See also: *Levy* v. *Parker,* 478 F.2d 772 (3 Cir. 1973). The Court ruled that such a broad-brush prohibition fell far short of the Constitutional requirements of fair warning to the accused and an ascertainable standard for the judge. Certainly, the Chicago Fire Department does not have a freer hand in constructing its disciplinary system than the United States Armed Forces. Section 61.001 of the Rules and Regulations of the Chicago Fire Department does not approach the Constitutional requirements of due process of law.

D. The Summary Suspension of Plaintiff Violates His Constitutional Right to Due Process of Law.

The suspension of Lt. Muscare was carried out by means of a verbal pronouncement from three of his superior officers in the Fire Department and a one-page letter from the Chief of Personnel informing him that he was "accused of" violating certain sections of the Rules and Regulations of the Chicago Fire Department. Plaintiff's suspension became effective immediately after the three superior officers entered his fire station on February 27, 1974. Plaintiff was afforded no opportunity to make a case on his own

behalf before the penalty of suspension was imposed upon him.[1]

It is well settled that the public employees have rights in their employment which cannot be taken away without procedural due process. *Slochower* v. *Board of Higher Education of the City of New York,* 350 U.S. 551, 76 S.Ct. 637 (1956). *Perry* v. *Sinderman,* 408 U.S. 593, 92 S.Ct. 2694 (1972).[2] The protections of procedural due process apply whether the penalty being imposed amounts to a permanent discharge or a suspension from whatever public property right is involved. *Snead* v. *Department of Social Services, City of New York,* 355 F.Supp. 764 (S.D.N.Y. 1973), *Soglin* v. *Kauffman, supra.*

In *Hostrop* v. *Board of Junior College District No. 515, Counties of Cook and Will, and State of Illinois,* 471 F. 2d 488 (7 Cir. 1973), the United States Court of Appeals for the Seventh Circuit set forth the procedure which must be followed in order to afford a public employee elementary due process:

> We find that the resolution of these interests requires that Plaintiff be given a notice of the charges against him, notice of the evidence upon which the charges will

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1 It is plain that this initial suspension is merely a prelude to additional disciplinary action against Plaintiff unless he conforms to the administration's views of "proper personal appearance."

2 The protections against being deprived of life, liberty or property without due process of law are so fundamental to the American system of ordered liberty that the requirements of elementary procedural due process has been imposed in cases involving a wide range of interests including, for example, the right to a hearing before consumer goods may be summarily repossessed, *Fuentes* v. *Schevin,* 407 U.S. 67, 92 S. Ct. 1983 (1972) or welfare benefits cut off, *Goldberg* v. *Kelly,* 397 U.S. 254, 90 S. Ct. 1011 (1970).

be based, a hearing before a tribunal possessing apparent impartiality, and a chance to present witnesses and confront adverse evidence at the hearing.
[471 F.2d 488 at 495].

Further, these procedures must be made available to the government employee prior to the action against him. As the United States Court of Claims pointed out in *Ricucci* v. *United States,* 425 F.2d 1252, (Ct. Cl. 1970):

> Few of them [government employees] earn more than enough to pay their living expenses from month to month, and when their salaries are cut off, they may be in the same destitute circumstances as a welfare recipient whose aid has been discontinued.
> [425 F. 2d 1252 at 1256].

Just as a welfare recipient may not be cut off from the basic necessities of life without a hearing prior to the action, *Goldberg* v. *Kelly, supra,* or a citizen deprived of his everyday consumer goods without judicial process, *Fuentes* v. *Schevin, supra,* and *Sniadach* v. *Family Finance Corporation,* 395 U.S. 337, 89 S.Ct. 1820 (1969), this Court should not permit a fire fighter with civil service status and twenty years' service with the Department to be summarily suspended without prior opportunity to meet the charges against him and present any kind of defense. Only the most serious type of emergency would justify the procedure used to suspend Lt. Muscare. The present case is hardly such an instance, where the Fire Department utilized the services of Lt. Muscare for a period of over two months from the time he was initially reprimanded for wearing a goatee. The manner in which Lt. Muscare was involuntarily suspended from his employment only illustrates the abuses which the right to due process is designed to avoid.

E. As Applied to Plaintiff in this Case, §61.006 of the Rules and Regulations of the Chicago Fire Department is Unconstitutional.

Under §61.006, Plaintiff is being punished for failure to obey orders which infringe upon his Constitutional rights to personal freedom and due process of law. Just as the Fire Department was exceeding its powers by ordering Plaintiff to shave his goatee and thus forego his Constitutional rights under §51.133 and §61.001, Rules and Regulations, Chicago Fire Department, they cannot now punish Plaintiff for failing to obey an unconstitutional order, accomplishing by indirection what they could not do directly. The Court in *Hunt* v. *Board of Fire Commissioners, supra,* drew this obvious conclusion from its ruling that the Fire Department had no right to dictate its members' appearance:

> It follows that John Hunt's promise to obey the department rules must be read as requiring only that he comply with rules not in violation of his constitutional rights and not as a waiver of such rights.
> [327 N.Y.S. 2nd 36 at 41].

Or, as the Seventh Circuit recently affirmed in *C.O.P.* v. *Conlisk,* ..... F.2d ..... (7 Cir. 1973):

> The district court held that Rules 2, 5, and 6 were unconstitutional as applied in this case. We agree with this determination. Rules 2, 5, and 6 were used only in conjunction with Rule 51 in discharging the six policemen. The underlying 'violation' in each case was the exercise of the privilege against self-incrimination before the grand jury, which was prohibited by Rule 51. Since we have found Rule 51 to be constitutionally invalid insofar as it denies the Fifth Amendment right to a public employee where there is a possibility of criminal prosecution, the use of Rules 2, 5, and 6 in conjunction with Rule 51 in such a circumstance was also invalid.

IV.

CONCLUSION

Since February 27, 1974, Lt. Francis Muscare, a fire fighter who has devoted twenty years to the service of the City of Chicago Fire Department, has been separated from his employment, with accompanying loss of income, job opportunities, and reputation in the community. He has been thus penalized for attempting to exercise his Constitutional right to determine his personal appearance. The penalty of suspension, with accompanying further penalties if Plaintiff does not forego his Constitutional rights, was imposed upon him without even a semblance of the procedures required by due process of law. By virtue of his suspension from the Chicago Fire Department, Plaintiff has been and is continuing to be, subjected to irreparable injury. Plaintiff is thus being deprived of his Constitutional rights in the most immediate, irreparable manner and for no justifiable governmental reason. Only immediate action by this Court can terminate the imposition of this injury on Plaintiff.

Respectfully submitted,
/s/ Robert S. Sugarman
/s/ Linda R. Hirshman
Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

Name of Presiding Judge, Honorable Frank J. McGarr
Cause No. 74C 656 Date Mar. 11, 1974
Title of Cause—Francis Muscare v. Robert J. Quinn, individually and as Commissioner, Chicago Fire Department

Brief Statement of Motion—Shall move the Court for a temporary restraining order
Names and Addresses of moving counsel—Linda R. Hirshman of Jacobs, Gore, Burns & Sugarman, 201 North Wells, Suite 2122, Chicago, Illinois 60606
Representing—Plaintiff

Motion for a temporary restraining order is denied. Cause continued to Mar. 19, 1974 at 2:00 P.M. for hearing on preliminary injunction. McGarr, J.

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

APPEARANCE

(Filed March 19, 1974)

I enter my Appearance as Attorney for said Robert J. Quinn.
Dated: 2-19, 1974

/s/ Richard L. Curry
Corporation Counsel
City Of Chicago
/s/ R. L. Curry by
/s/ Philip M. Sheridan
Asst. Corp. Counsel

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

MOTION IN OPPOSITION TO THE GRANTING OF PRELIMINARY INJUNCTION

(Filed March 19, 1974)

Now comes the Defendant, Robert J. Quinn, Commissioner, Chicago Fire Department, by his attorney, Richard

L. Curry, Corporation Counsel of the City of Chicago, and moves this Honorable Court to deny plaintiff's prayer for a Preliminary Injunction and in support thereof states as follows:

1. The plaintiff has failed to show that without such relief he would be irreparably damaged. The so-called irreparable injury that is alleged by plaintiff amounts to no more than the suspension on his record and loss of salary incurred as the result of the 29 day suspension. Even if this Court were to find that he had been illegally "injured", nevertheless, such injury is not irreparable. Economic injury, loss of income or employment does not entitle an individual to injunctive relief. The plaintiff is not injured in any manner that could not be readily rectified if he is successful on the merits. For reasons that the defendant will show at this hearing, the defendant submits that it would not be in the public interest to issue a Preliminary Injunction.

The burden is clearly upon the parties requesting temporary or preliminary injunctive relief to demonstrate that they are entitled to such relief. *Crowther* v. *Seaborg,* (CA 10th, 1969) 415 F.2d 437; *Weber* v. *Continental Motors Corp.,* (S.D.N.Y. 1969) 365 F.Supp. 404. It is also settled that the granting of a temporary or preliminary injunction is a matter of Judicial discretion. The propriety of its issuance depends on the circumstances of a particular case. *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 316 U.S. 4 (1942). Courts consider the effect their actions might have on the public interest prior to issuing injunctive relief, see *Yakus* v. *U. S.,* 321 U.S. 414; *Snively Groves* v. *Florida Citrus Commission,* D. C. Fla. 1938, 23 F.Supp. 600.

2. There has been no prima facie showing by the plaintiff of reasonable probability that he will prevail on the merits of the case.

It would appear the Federal Courts in the various circuits are divided about equally with respect to the constitutional right of a student to choose the length of his hair. See footnote 5 in *Arnold* v. *Carpenter,* 459 F.2d 939 (7th Cir. 1972) cited by plaintiff and *New Rider* v. *Board of Education of Indiana School District No. 1, Okl.,* 480 F.2d 693 (10th Cir. 1973). These student-hair cases are not, however, controlling in the case before this Court.

The salient issue before this Honorable Court is whether or not the Chicago Fire Department was justified in suspending plaintiff, a Lieutenant in the Chicago Fire Department, because of his refusal to shave off his beard. The factual situation in the case at bar is very similar to that presented in the case of *Yarbrough* v. *City of Jackson,* 363 F.Supp. 1176 (M.D. Fla. 1973). The Fire Department in that city had a grooming regulation with respect to the prohibition of beards and limitations with respect to the type of mustaches and length of hair that could be worn by firemen similar to Section 51.133 of the Rules and Regulations of the Chicago Fire Department. The plaintiff therein was discharged from his employment for refusing to obey an order by a Fire Chief to trim his hair. The plaintiff therein filed suit alleging an illegal infringement upon the constitutionally protected rights of freedom of expression of firemen.

The Court granted judgment to the City of Jackson for two reasons. The first reason was that the Court was unwilling to interfere with the reasonable conclusions of the responsible officers in the Fire Department that there was a rational relationship between longer hair and per-

sonal safety of its firemen (longer hair more prone to catch on fire, interference with seal of gas mask). The second basis for the decision of the Court was its "firm conviction that it is not the function of the judiciary to interfere with a fire chief's reasonable notion as to what is necessary to maintain discipline within a 'quasi military' organization for which he is responsible and which is dedicated to the protection of the public and its property" (p. 1179). With respect to the second basis of its decision the Court noted it was following the case of *Stradley* v. *Anderson,* 478 F. 2d 188 (8th Cir. 1973), rather than the case of *Owen* v. *Barry,* 483 F. 2d 1126 (2nd Cir. 1973), because it felt "there is a rational relationship between discipline among firefighters and public safety and that it is not the province of this Court to dictate its own philosophy as to the best method to promote discipline" (p. 1181).

The recent Illinois case of *Hordorwich* v. *Board of Police and Fire Commissioners of Melrose Park,* ..... Ill. App. 3rd. ..... (No. 58652—Copy of Opinion attached), sustained the discharge of a fireman who refused to follow a hair regulation and refused a direct order to obtain a haircut. After noting that the evidence substantiated that sideburns interfered with the use of a smoke mask the Court stated —"Personal rights must be reasonably limited when the safety of firemen and others is involved."

On January 4, 1974, the Supreme Court of New Jersey sustained in an Abstract Opinion (64 N.J. 142) the decision of the Superior Court of New Jersey in the case of *Manco* v. *Town of Irvington,* 126 N.J. Super. 148 (1973). The fireman therein had been suspended for violating a directive of his department requiring him to have short hair and a clean face so that a good face seal could be obtained on face masks used in fighting fires.

The defendant respectfully submits that the defendant acted properly and was justified in suspending the plaintiff for his having the beard and his refusal to obey a direct order to shave off his beard.

3. Plaintiff has failed to exhaust the State Administrative and Judicial remedies available to him. *Slayton* v. *Smith,* 404 U.S. 53 (1971), Section 10-1-18 of Chapter 24 of the Illinois Revised Statutes, 1971, provides no civil service employee shall be suspended for over 30 days except for cause upon written charges and after an opportunity to be heard in his own defense by the Civil Service Commission. This Section also grants those in charge with the administration of a department the power to suspend an employee for 30 days or less and grants to said employee the right to have a hearing before the Civil Service Commission concerning the propriety of that suspension if said suspension was for more than 5 days or incurred within 6 months of a previous suspension regardless of the length of said suspension.

In *Elko* v. *McCarey,* 315 F. Supp. 886 (E.D. Pa. 1970), the Court refused to proceed on a case where a fireman was suspended for violating a hair regulation and allegedly threatened with additional disciplinary sanctions because the Court felt that there was no immediate irreparable injury that could not be redressed by the utilization of available administrative remedies and judicial review provided for by city civil service regulations. The factual situations before the Court would appear to be substantially the same.

Wherefore, the Defendant, Robert J. Quinn, Individually and as Commissioner, Chicago Fire Department, prays that this Honorable Court deny the request for a Preliminary

Injunction and for such other relief as this Honorable Court may deem meet and just.

Richard L. Curry, Corporation Counsel
of the City of Chicago,
Attorney for Defendant,
Robert J. Quinn, Individually and as Commissioner, Chicago Fire Department,
By: /s/ Philip M. Sheridan
Assistant Corporation Counsel

State Of Illinois
County Of Cook—ss

AFFIDAVIT

Philip M. Sheridan, being first duly sworn on oath, deposes and says that he is an Assistant Corporation Counsel and in said capacity has been assigned to this cause; that he has read the foregoing Motion by him subscribed and that the same is believed to be well founded and that any facts contained therein are correct and true to the best of his knowledge and belief.

/s/ Philip M. Sheridan
Assistant Corporation Counsel

Subscribed And Sworn To
Before Me This 19th Day
Of March, A.D., 1974.

/s/ Barbara E. Hanses
Notary Public
(Seal)

58652

Peter Hordorwich,
Plaintiff-Appellant,
v.
Board Of Police And Fire Commissioners Of Melrose Park, et al.,
Defendants-Appellees.

Appeal From
Circuit Court,
Cook Countv.
Hon.
Edward F. Healy,
Presiding.

Mr. Justice Dieringer delivered the opinion of the court:

This is an appeal from a judgment entered by the Circuit Court of Cook County sustaining the plaintiff's discharge by the Board of Police and Fire Commissioners of the Village of Melrose Park.

The issues presented on appeal are (1) whether the findings and decision of the Board of Police and Fire Commissioners of Melrose Park were based upon cause and supported by substantial evidence; (2) whether the Board's denial of plaintiff's motion for continuance constituted prejudicial error and deprived the plaintiff of a fair hearing; and (3) whether the findings of the Board were adequate to support the decision of the Board.

The plaintiff, Peter Hordorwich, became a fireman for the Village of Melrose Park in 1967. On March 15, 1971, Fire Chief Anthony Zito posted a General Order which directed all Melrose Park firemen to be clean shaven and to have their hair cut in conformity with an attached drawing of a human head. In December, 1971, Chief Zito suspended the plaintiff from duty for his failure to comply with the General Order and insubordination in disobeying a direct order to obtain a haircut. Chief Zito also filed charges with the Board of Police and Fire Commissioners of the Village of Melrose Park asking for plaintiff's dis-

charge. A hearing on the charges was held on January 21, 1972. At the hearing counsel for plaintiff requested a continuance for the reason that he was not yet adequately prepared for trial. The motion was denied by the Board. On February 28, 1972, the Board found that cause existed for the discharge of the plaintiff from his position as fireman in that he "was not clean shaven nor did he have a length of hair so as to be able to perform all of his duties required as a fireman . . . [and in that he was] . . . guilty of insubordination in that on December 21, 1971, he did violate a direct order of the Chief of the Fire Department of the Village of Melrose Park to get a hair cut that would place him within the purview of the General Order of March 15, 1971," and he was thereupon discharged. He filed suit in the Circuit Court of Cook County and on November 17, 1972, a hearing was held on the plaintiff's amended complaint in administrative review. At the close of the hearing the court sustained and affirmed the Board's decision to discharge the plaintiff.

The plaintiff's first contention is the findings and decision of the Board of Police and Fire Commissioners of Melrose Park were neither based upon cause nor supported by substantial evidence. The plaintiff argues the Board's finding plaintiff was "unfit for duty by reason of his long hair" was insufficient. He relies on the decision in *Gigger* v. *Board of Fire and Police Commissioners,* (1960) 23 Ill. App. 2d 433, wherein the Appellate Court held it is imperative the record of an administrative hearing show that an impartial inquiry into the facts was conducted.

We believe the findings and decision of the Board of Police and Fire Commissioners were based upon cause and supported by substantial evidence. The scope of review of the final decision of an administrator agency is well settled and succinctly stated in *Davern* v. *Civil Service Commission of the City of Chicago,* (1970) 47 Ill. 2d 469, wherein the Supreme Court stated:

> "The Administrative Review Act provides that agency findings on questions of fact are 'prima facie true and correct' (Ill. Rev. Stat. 1967, Ch. 110, par. 274.) We have construed this provision to limit the function of the reviewing court to ascertaining whether the findings and decisions of the administrative agency are against the manifest weight of the evidence . . . . The courts will not reweigh the evidence, but are limited to a determination whether the final decision of the administrative agency is just and reasonable in light of the evidence presented."

In the case at bar the Chief of the Melrose Park Fire Department promulgated a General Order which directed all firemen to be clean shaven and to have their hair cut in accordance with an attached drawing of a human head. Failure to comply with the order would result in disciplinary action. Evidence submitted at the hearing before the Board established that inordinate growth of hair and sideburns could cause an inability to wear a smoke mask required at certain types of fires and would be detrimental to a fireman's safety and the safety of others. It was further established the plaintiff did not comply with the General Order and disobeyed the direct orders of his superior to comply with said General Order. We conclude therefore, that the findings and decision of the Board were based upon valid cause for removal of the plaintiff from his duties and fully supported by the evidence.

The plaintiff's second contention is the denial of his motion for continuance by the Board constituted prejudicial error and deprived plaintiff of a fair hearing. The plaintiff bases his contention on the decision in *Lindeen* v. *Illinois State Police Merit Board,* (1962) 25 Ill. 2d 349, wherein the Supreme Court held the Board's denial of a motion for continuance deprived plaintiff Lindeen of a fair trial.

We do not agree with the plaintiff's contention. It is well settled that the granting of a continuance is a matter which rests in the sound discretion of an administrative tribunal. (*People ex rel. Egan* v. *Dunham*, (1942) 314 Ill. App. 110.) In the instant case, the plaintiff and his attorney did not file a written motion for continuance prior to the hearing but, rather, orally requested a continuance at the hearing. Plaintiff's counsel stated he was requesting a continuance because he was not adequately prepared for trial. At the hearing, however, counsel demonstrated he was well versed in all facets of the circumstances giving rise to plaintiff's suspension and presented an admitted expert in fire fighting devices. Under these circumstances we conclude the Board did not breach its discretion in denying plaintiff's motion for continuance.

Plaintiff's final contention is the findings of the Board were inadequate to support its decision to discharge the plaintiff. The plaintiff argues he was not insubordinate and the order issued by Chief Zito to get a haircut could not reasonably be construed as an order which the plaintiff had to obey. In support of his contention the plaintiff relies primarily on the decision in *Lindquist* v. *City of Coral Gables*, (1971) 323 F. Supp. 1161, wherein the District Court of Florida held a hair regulation was invalid as the City had shown no relationship between sideburns and interference with the proper functioning of the fire department.

We believe the findings of the Board were adequate to support its decision. A review of the record indicates the plaintiff violated a General Order promulgated as a safety measure to firemen as well as victims of fires. Furthermore, the plaintiff violated a direct order of the Fire Chief to obtain a haircut. Such insubordination cannot be condoned. Rules designed for purposes of safety and efficiency must

be followed. What if a fireman refused to wear his uniform, or boots, or fire hat, or ride the firetruck to the scene of a fire, insisting upon doing as he pleased? Such results could be chaotic and disastrous. Personal rights must be reasonably limited when the safety of firemen and others is involved.

For the reasons stated herein, the judgment of the Circuit Court of Cook County is affirmed.

Affirmed.

Adesko, P.J., and Burman, J., concur.

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

SUMMONS
(Filed March 19, 1974)

To the above named Defendant:

You are hereby summoned and required to serve upon Linda R. Hirshman of Jacobs, Gore, Burns & Sugarman, plaintiff's attorney, whose address is 201 North Wells Street, Suite 2122, Chicago, Illinois 60606 an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

/s/ H. Stuart Cunningham
Clerk of Court.
/s/ Dan H. Stevenson
Deputy Clerk.
[Seal of Court]

Date: March 11, 1974

Note:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(U. S. Marshal's Service showing date of service as 3-13-75)

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

1 TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause, before the Honorable Frank J. McGarr, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Tuesday, March 19, 1974, at the hour of 2:00 o'clock p.m.

Present:
Messrs. Jacobs, Gore, Burns & Sugarman
(201 North Wells Street, Suite 2122,
Chicago, Illinois, 60606), by
Mr. Charles Orlove and
Mrs. Linda Hirshman,
appeared on behalf of the plaintiff;
Mr. Richard L. Curry,
Corporation Counsel,
City of Chicago
(City Hall, 5th Floor,
Chicago, Illinois, 60602), by
Mr. Philip M. Sheridan,
Assistant Corporation Counsel,
appeared on behalf of the defendant.

2 The Clerk: 74 C 656, Francis Muscare versus Robert J. Quinn, et cetera, hearing on preliminary injunction.

Mr. Orlove: Good afternoon, your Honor. Charles Orlove and Linda Hirshman appearing for the plaintiff.

I see some—whom I think to be, perhaps, officials from the Fire Department.

The Court: Who is the attorney for the defendant in this case?

Mr. Sheridan: Your Honor, is this Muscare?

The Court: Yes.

Mr. Sheridan: I am, your Honor. My name is Philip M. Sheridan. I am an Assistant Corporation Counsel, your Honor.

The Court: All right, Mr. Sheridan, I will give you a minute to put your coat down.

Mr. Sheridan: Thank you, sir.

The Court: There has been no appearance filed for the defendant. I assume you intend to do that, Counsel?

Mr. Sheridan: Yes, I would like to file an appearance, your Honor.

I would also ask leave, your Honor, to file a motion in opposition to the granting of a preliminary injunction.

The Court: Well, the case is set this afternoon, as I recall, for hearing on a preliminary injunction. And I intend to go forward with that.

3 Mr. Sheridan: Yes, I understand, your Honor.

The Court: You may file your motion, however, and I will look at it.

Mr. Sheridan: I understand, your Honor.

The Court: And, perhaps, if it becomes appropriate, you can argue whatever basis you have for it. But in the meantime, and I assume, Counsel, you will file an appearance some time soon.

Mr. Sheridan: Before I leave the court, your Honor.

The Court: I will count on that.

In the meantime, I have set the matter today for a hearing on such evidence as the plaintiff cares to produce for a preliminary injunction. And I am ready to go forward on that, if you are, Counsel?

Mr. Orlove: Fine, we are ready, your Honor, except that, of course, the Court knows we have just received a copy of this motion, we haven't seen it before this minute.

Also, I would point out to the Court that we have on file our complaint and the motion for a temporary restraining order. The complaint is verified by the plaintiff. And the motion for a restraining order is also supported by an affidavit.

The Court: Those things are deemed—let's assume that the motion for temporary restraining order and preliminary injunction is consolidated for all purposes. Any evidence or argument made in support of one will automatically be considered in support of the other.
4 Your affidavit, therefore, stands in support of the motion for preliminary injunction and anything else you have filed.

So that, I think, the spirit of the rules is that whenever possible we consolidate the two. If you are entitled to a T.R.O., you are probably entitled to a preliminary injunction. Let's assume we are going forward for a hearing on the preliminary injunction issue. Anything of record and anything mentioned earlier in the case is relevant and will be considered.

Do you want to rely on your affidavit or do you have additional evidence?

Mr. Orlove: We can rely upon that affidavit, your Honor, as evidence in support of our case in chief.

The Court: And the affidavit contains pictures of the plaintiff. So to the extent that we have to see the dimensions of his beard, we have that in the record.

Are you prepared to argue the matter, assuming this closes the evidence, Counsel?

Mr. Sheridan: Your Honor, I would like an opportunity to present evidence.—

The Court: Fine.

Mr. Sheridan: —if I may?

The Court: All right. I assume that the plaintiff rests on the pleadings and the affidavit, is that correct?

Mr. Orlove: Yes, that is correct, your Honor. And,
5 of course, we have an opportunity for rebuttal.

The Court: The defense may put in evidence. And you, certainly, have rebuttal opportunity, if it becomes appropriate.

Go ahead, Counsel.

Mr. Sheridan: Your Honor, I have various witnesses that will testify. Can I ask that they all be sworn at the same time?

(Witnesses sworn.)

LEONARD JOHNSON, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Sheridan.

The Court: State your name, sir?

The Witness: My name is Leonard Johnson.

The Court: Your address, Mr. Johnson?

The Witness: 5747 West 64th Street.

The Court: Your business or occupation?

The Witness: I'm a drill instructor at the Chicago Fire Academy.

The Court: All right. Go ahead, Counsel.

By Mr. Sheridan:

Q. Mr. Johnson, can you tell us what subjects you teach at the Fire Academy, please?

6 A. I teach the self-contained breathing apparatus, manufactured by M.S.A. Company.

Q. During the course of the middle part of February, did Lt. Muscare happen to be a student in one of your classes?

A. Yes, sir, he was.

Q. Now, when students appear for the purpose of taking the instruction with respect to this self-contained breathing apparatus, how long is instruction given; how many days?

A. Two days.

Q. Calling your attention to the first day that Lt. Muscare was present there—

The Court: Let me interrupt for a moment. Let's get the plaintiff's name straight. That is Muscare, M-u-s-c-a-r-e, Muscare.

Mr. Sheridan: Thank you, your Honor.

By Mr. Sheridan:

Q. On the first day that Lt. Muscare appeared for the lessons, who did he appear with?

A. He appeared with Hook and Ladder Company 10.

Q. Is he in charge of Hook and Ladder Company 10, or the senior officer there?

A. Yes, sir, that particular shift.

Q. Now, during the course of your instruction, did you have occasion to lecture the students or inform
7 the students, in any manner, with respect to the policy of the Fire Department regarding facial hair?

A. Yes, sir, we do.

Mr. Orlove: I would object, your Honor, to the leading nature of the question, unless this is preliminary—

The Court: I assume we are getting through preliminaries here. The objection is overruled. Go ahead.

By Mr. Sheridan:

Q. Will you tell the Court, what, if anything, you stated on the first day the students were present with respect to that subject matter?

A. When I got to the wearing of the face-piece, I explained the importance of a tight face seal and about the objection of facial hair, whether it be beards, sideburns or moustaches.

Q. At the time you did that, what, if anything, happened?

A. A remark was made.

Q. And who made the remark?

A. Lt. Muscare.

Q. Will you tell the Court what, if anything, Lt. Muscare stated?

A. Lt. Muscare said, "Boston and New York have men with long hair, beards, moustaches, and they are not concerned about it."

8 Q. Now, in the conducting of these classes, is it customary for students to speak out in such a manner?

Mr. Orlove: Objection.

The Witness: No, sir, it is not.

The Court: The objection is sustained. I will disregard it. Go ahead.

By Mr. Sheridan:

Q. Did you have occasion to have the students, on that day, put on the self-contained breathing apparatus?

A. Yes, sir, every member of the company puts the apparatus on.

Q. Now, are you able to tell, when the apparatus is charged, whether or not that person is getting a good facial fit?

A. Only when they test the seal of the face mask.

Q. Do you have to have the machine charged?

A. Yes, sir, you do.

Q. Now, do all the students, on the first day, charge their machines?

A. All but one, sir.

Q. Who was that one?

A. Lt. Muscare.

Q. Now, recalling—

The Court: Would you stop for a moment and ex-
9 plain that a little bit to me? Would you tell me, Mr. Johnson, what do you mean by "charging"?

The Witness: Your Honor, by charging the apparatus, you open up the cylinder valve and your regulator valve on the apparatus, which allows the air, the high pressure air, into the regulator, through the regulator up into the face piece, so you get your air.

The Court: Are you able to tell, by watching a student do this, whether there is a facial seal, whether there is a tight seal?

The Witness: Yes, sir, I can.

The Court: When you said that Lt. Muscare did not charge his, what do you mean; it didn't charge or he didn't do it?

The Witness: He didn't do it, no, sir.

The Court: All right. Go ahead.

By Mr. Sheridan:

Q. Now, on the second day of class, did you have occasion to show them any slides?

A. Yes, sir.

Q. And on the slides—during the course of watching the slides, is there any voice mechanism operating at the same time?

A. Yes, sir, there is a tape recording.

10 Q. Now, at any place during the operation of that type, is any reference made to the subject matter of facial hair and the wearing of the mask?

A. Yes, sir.

Q. And basically can you tell us what the statement states?

Mr. Orlove: Objection, your Honor. That would not be the best evidence of that.

The Court: Well, I assume that Mr. Johnson is reporting something that is part of the instructional material in the class.

Is that right?

The Witness: Yes, sir.

The Court: This instructional slides and tape that you are talking about?

The Witness: Yes, sir.

The Court: All right. The objection is overruled.

What does the tape recording say about facial hair?

The Witness: The tape recording says that sideburns, moustaches and beards will not permit a good fit.

By Mr. Sheridan:

Q. Now, at the time the voice on the tape was making the statement, did Lt. Muscare make any statements?

11 A. Yes, he did.

Q. Can you tell us, if anything, he stated?

A. He said, "New York and Boston have long hair and they are not concerned with the problem of tight face seals."

Q. Now, following the—at any time that day, did any of the students again don these machines?

A. You mean the second day, sir?

Q. Yes, sir.

A. Yes, sir, on the second day every man put the apparatus on.

Q. And what did they do?

A. They walked to the 5th floor with the apparatus on, to get an actual effect of wearing the apparatus while they are exerting themselves.

Q. Now, approximately how many men were in Lt. Muscare's company at this time, taking these instructions?

A. I believe there were five, sir.

Q. And did Lt. Muscare—did he also participate by putting the machine on—turning it on and use it while it was operating, walk these five flights of stairs?

A. No, sir, he did not.

Q. Did he put the machine on at all that day?

A. No, sir.

Q. Did you subsequently have a conversation with
12 any one regarding the attendance of Lt. Muscare in your class?

A. I talked to Chief Prohaska.

Mr. Sheridan: Will you please mark this as Defendant's Exhibit No. 1 for identification.

(The document was thereupon marked Defendant's Exhibit No. 1 for identification, 3/19/74.)

By Mr. Sheridan:

Q. I would like to show you what has been heretofore marked as Defendant's Exhibit No. 1 for identification; and ask you if you recognize that document?

A. Yes, sir, I do.

Q. And what do you use that document for, if anything?

Mr. Orlove: Objection, your Honor.

The Court: Let me—before I rule on that objection, tell me briefly what it is, sir?

By Mr. Sheridan:

Q. Can you tell us briefly what that exhibit is?

A. This is a fire officer's guide for—prepared by the National Fire Prevention Association, on breathing apparatus for the fire service.

The Court: All right. Now the next question is, what use do you put that to—or does the Fire Department put that to, if you know.

13 I will assume there is an objection to that.

Mr. Orlove: Your Honor, if the Court please, there is. I would object to the use of that document without any proper foundation being laid for its credibility, validity.

The Court: Until we get an answer to this question, as to whether it is used, I don't think we can get into that. The objection is overruled.

You may answer. What use is that put to in the Chicago Fire Department?

The Witness: It covers—

The Court: Well, how do you use it, if you use it at all?

The Witness: I use the information in here as far as maintenance of the breathing equipment and how a breathing apparatus is tested and also respiratory hazards in general.

The Court: Do you use it as part of your teaching? Do you use it instructing your students?

The Witness: Yes, sir, I do.

The Court: All right. You may cross examine on its authenticity and its source, Counsel, but over objection, I will allow those answers to stand.

Go ahead.

Mr. Orlove: Do you wish me to examine now?

14 The Court: No, I don't mean now. I mean whenever cross examination is appropriate.

Mr. Sheridan: I have no further questions, your Honor.

The Court: To enlighten me on the contents of that manual, may I glance at that, please?

Mr. Sheridan: Perhaps, I should ask him another question, your Honor.

The Court: Ask him what section is relevant to this problem.

By Mr. Sheridan:

Q. With respect to the subject matter under consideration by the Court, do you use that book in any fashion?

A. Yes, sir, I do.

Q. Can you point out the page you are referring to?

A. On Page 2.

Mr. Sheridan: Would you like me to—

The Court: May I see Page 2, then we will show it to opposing counsel.

You are referring to the portion marked out in yellow?

The Witness: On the left-hand page, Judge, your Honor, and on the—

The Court: All right. At the bottom of Page 2, Counsel, there is a section here called, "Beards, moustaches and sideburns", and it continues over to the top
15 of Page 3. I have read it and you may wish to use it for cross examination.

Mr. Orlove: Yes. May I see it, your Honor?

The Court: Yes.

Any further questions, Counsel?

Mr. Sheridan: No, I do not, your Honor.

Cross Examination by Mr. Orlove.

Q. Is it Officer Johnson?

A. Fireman.

Q. What rank do you hold with the Fire Department?

A. I'm a Firefighter, First Class.

Q. How long have you held that rank?

A. Nineteen and a half years.

Q. And your present position with the Fire Department is an instructor, is that correct?

A. That is correct, sir.

Q. How long have you held that position?

A. Approximately five months.

Q. What subjects do you give instruction on?

A. On the self-contained breathing apparatus.

Q. That is the only subject that you are involved with?

A. Yes, sir, that's the only one.

Q. And the text book that you looked at, and that
16 you have identified, is this your only source material with respect to self-contained breathing apparatus?

A. No, sir, I have other material.

Q. Do you recall the day or days that Lt. Muscare was at the Academy for instruction?

A. Not the exact days, it was some time in February.

Q. Was it one or more than one day?

A. More than one day.

Q. To your knowledge, Mr. Johnson—strike that.

When—I believe you started giving instruction on self-contained breathing apparatus—can I call those masks?

A. Yes, you can.

Q. You started giving instructions on mask five months ago, is that correct?

A. That's right, sir.

Q. Is that the first time the Fire Department had any instruction on self-contained breathing apparatus?

A. No, sir, it isn't.

Q. What material were you given when you were assigned that job of giving the instruction on the masks?

A. I was given a mask program outline, a bulletin put out by the American Standard—National Standards Institute, other reprints of bulletins of findings of masks. And I also have the training book from the International Fire Chiefs Training School. I believe it is called "Ifsta", I'm not sure if I got the right desig-
17 nation of it or not.

Q. Were instructions being given on masks before you started five months ago?

A. Yes, sir, they were.

Q. Masks aren't generally used by all levels of the Department, are they?

A. What do you mean by all levels of the Department, sir?

Q. Well, all units in the Fire Department, do they all use masks?

A. Yes, sir, they do.

Q. Are you saying everyone is assigned to masks?

A. No, sir, I did not say that.

Q. All right. Which units are assigned to masks? Or which units have masks assigned to them?

A. The flying manpower squads, trucks, hook and ladder companies, engines.

Q. Are you saying that all hook and ladder companies are assigned masks?

A. No, sir.

Q. Which hook and ladder companies are?

A. Offhand, I can't tell you that.

Q. But you know that all of them are not?

A. That is correct.

Q. Now, you said that when you gave your talk
18 to the—to that particular company, you were talking about an objection to facial hair?

A. Yes, sir, I was.

Q. With respect to the mask?

A. Yes, sir.

Q. And you included in that long sideburns, moustaches and beards?

A. And beards, yes, sir.

Q. Aren't you aware that the Fire Department permits the wearing of moustaches to a certain extent?

A. Yes, sir, to a certain extent.

Q. But you are telling the men, during this instruction, that moustaches should not be worn when wearing face masks, is that correct?

A. That is correct.

Q. How many men have you given instruction to, approximately, within the last six weeks?

A. Approximately over 100.

Q. And isn't it correct that some of those men, aside from Lt. Muscare, have appeared with moustaches?

A. Yes, they have.

Q. And this is the speech though that you regularly give to all your groups, that moustaches are not to be worn in connection with wearing self-contained breath-
19 ing apparatus, is that correct?

A. Yes, it is.

Q. You gave some testimony about the machine being charged, and I must confess, I don't quite understand it. What do you mean by "machine"?

A. The apparatus.

Q. What does the apparatus consist of?

A. It consists of your air cylinder, your face piece and breathing tube, your harness, which the tank is mounted to, which in turn is put on your back to carry the apparatus.

Q. You also said something about machines being charged, what do you mean by "charged"?

A. Activated so that you can use it.

Q. Have you heard of a product called M.S.A. masks?

A. Yes, I have.

Q. Do you know what those are?

A. Yes, sir, I do.

Q. Would you tell the Court, please?

A. M.S.A. mask is a thirty-minute compressed air mask, used for the protection of firemen or industrial respiratory systems.

Q. And that is a self-contained breathing apparatus, is that correct?

A. That is right, sir.

20 Q. In other words, the air from tanks that are worn by the individual is used for that individual to breathe, is that correct?

A. Yes, sir.

Q. And that is the kind of mask that some of the units on the Fire Department—in the Fire Department use?

A. Yes.

Q. How long have those masks been used, if you know, by the Chicago Fire Department?

A. I do not know how long, no.

Q. Do you really know if they are used at all?

A. Yes, sir, they are used.

Q. Some units use them, is that correct?

A. Some units use them, yes, sir.

Q. And you don't know which units do and which units do not?

A. There are some hook and ladder companies, there are engine companies and the flying squad companies have them.

Q. And some hook and ladder companies do not use M.S.A. masks, is that correct?

A. The reason they don't use them, they are not issued to them as yet.

Q. I see. Well, the fact is that some units do not use—some hook and ladder trucks do not have any masks issued to them as of this time, is that correct?

A. I won't say any masks, they have masks, but it's not the M.S.A. mask.

Q. Can you testify—and do you know of your own knowledge that every hook and ladder truck has some kind of mask equipment assigned to it? We want your knowledge.

A. As far as to my knowledge, the hook and ladder companies do have some type of breathing apparatus.

Q. Now, when you use the word "charging", do you mean that somebody actually puts on the equipment and sees if the air goes—the self-contained air goes into the mask?

A. That is right, sir.

Q. Isn't there another way of testing the mask or an additional way of testing a mask?

A. Not to my knowledge, it has to be put on to—it has to be put on the person that is going to wear it, in order to test it.

Q. Isn't it correct that a mask can be put on without the tanks and tested by hold the tube—by holding your hand over the tube?

A. Yes, you can do that.

Q. In fact, isn't that what is recommended for the proper use of the mask?

A. That is correct.

22 Q. Do you tell your men that when you given them these instructions?

A. No, what I do is go through the procedure of putting the apparatus to work. I do not mention the fact that you can put the face piece on and kink the hose to test it for a seal, because we are going through the process of putting the apparatus on to work with it when we are going through the instructions.

Q. I see. If I understand your testimony then correctly, you are concerned only with giving the men instruction in the total use of the mask, how to put the tanks on, how to connect the tubes and how to wear the mask on their faces, is that correct?

A. That is correct.

Q. And your instruction does not include any tests that should be made by the man each individual time they wear the mask?

A. Yes, sir, there is individual tests that they have to make. They have to test the regulator of it.

Q. What is the regulator?

A. That is the heart of the apparatus, which reduces the high pressure air coming from the cylinder into the regulator, reduces it to a breathable pressure and also supplies the air to the wearer as he demands it.

Q. I see. You say that is the most important part
23 of the whole apparatus?

A. That is right, without that you can't operate.

Q. So if those tanks are working properly, and the pressure is breathing properly, then it can be operated, is that correct?

A. Yes.

Q. During your instruction to the men, do you also have them actually put the mask on, on their faces and test to see whether it is air-tight?

A. Yes, sir, I do.

Q. And will you describe for the Court, how one would properly test to see if the seal is air-tight?

A. When the face piece is put on the face, there are five straps, head straps that you must adjust for tightness, starting at the bottom and then the temple straps and the top one, if necessary. After that, you either kink your breathing tube or put your hand over the bottom and inhale to see if you have a proper seal on the face piece. If you have a proper seal, the face piece will collapse; if not, you will detect leaks around the edge of the face piece.

Q. Or there can be a leak in the tube, isn't that correct?

A. That is correct.

Q. In fact, if you kink the tube or squeeze the tube with your hand, you wouldn't really be testing it properly, would you?

24 A. Well, if you have a kink up close to the face piece and your leak was down here, you wouldn't detect that.

Q. But what if a leak occurred in the tube at the point where it was being kinked, then that wouldn't indicate—that wouldn't be a proper test, would it?

A. I don't follow you, sir.

Q. Well, if one were to kink the tube—that is grasp it in a fist—

A. Yes.

Q. —even at the bottom of the tube, and use that to test the mask, that test would not indicate any leak that might occur where the fist is holding the tube, isn't that correct?

A. It could be, yes.

Q. Right?

A. Yes.

Q. So the only way to test it is by holding the bottom of the tube with your hand?

A. Not necessarily. Like I say, you can't kink the tube.

Q. You just told us if you did kink the tube that might not indicate a leak that occurred where you were kinking the tube.

A. If you had that particular leak right on that kink where you had it grabbed.

Q. Well, are you suggesting to the men that you
25 are training that they should kink the tube like that?

A. Yes, sir, I am.

Q. Even though there may be a leak at the point where they are grasping it with their fist?

A. If there is a leak, it will be discovered, because when the apparatus is used and they return back to quarters that apparatus is given a test.

Q. When is the apparatus used?

A. It's used to perform a rescue, to shut off electrical appliances, gas supply lines, locating the seat of the fire and also for ventilation.

Q. Well, let me ask you this, Mr. Johnson, if one were to kink the tube as you suggest and there were,

in fact, a leak there, but it could not be detected by its fist kinking the tube that is—wouldn't that be dangerous to send that man into a smoke-filled room?

The Court: Counsel, it might be, but I don't see how it is relevant to the issues here. It seems that tightness around the face is the only thing we care about. And if the tube has holes in it that is a problem for the Fire Department. I just don't see where you are heading with that.

Mr. Orlove: Your Honor, it goes, I think, to the ability of this witness to speak authoritatively with
26 respect to the mask.

The Court: All right. We have established that the way he tests and recommends the test by kinking the tube, if that has deficiencies, you have established that. So let's go on to something else.

By Mr. Orlove:

Q. When you are at your instruction do the men test the masks themselves?

A. Yes, they do.

Q. So one checks the other to determine if the face seal is correct?

A. No, the man puts the apparatus on himself individually.

Q. I see.

A. And he goes through the test himself.

Q. I see. And then the man—each man determines for himself whether he has attained a good facial seal, is that correct?

A. Right, yes.

Q. Now, you testified that Lt. Muscare made some remarks about men in Boston and men in New York having beards; what was your response to that?

A. Well, I said, "I don't care what they do in New York or Boston, I am concerned with the men here." And I also went and got an article for him to look at, but he showed very little interest in it, in regard
27 to facial seal.

Q. Directing your attention particularly to the event when Mr.—or Lt. Muscare was at the Fire Academy, did you testify that he did not put the mask on?

A. I did.

Q. How many men were present at that time, when the mask was being tested?

Mr. Sheridan: Could I make an objection, your Honor? I think that the students were requested to put the mask on on both days. And I think the question might be—

The Court: I assume the same class both times. And he did testify that there were about five men in the class.

If you want to pin it down further on either day, go ahead.

By Mr. Orlove:

Q. How many masks were available to the men at the time they were putting them on?

A. On the first day of the class I have one mask that I use for demonstration purposes.

Q. Did the men put masks on on that day?

A. Yes, they did.

Q. They put on that one mask?

A. That is right, they did. And the second day we had two masks, and the reason I use the two masks is
28 because I want both companies to use the one mask to lower the pressure in the cylinder, so that the audi-alarm will ring so that they know what it sounds like.

And it won't be a strange feeling to them. But there were two masks available. You see, the cylinder is charged to 2,216 pound pressure per square inch and with the two companies using one mask, you can lower the pressure in the tanks quicker than you can if you use two masks, so we use the one mask until the alarm rings then we use the other mask.

Q. If I understand your testimony correctly, you are using one mask to check the pressure situation and you are using the other mask to try it on for a face seal, is that what you are saying?

A. No, no, we use the one mask—put it in operation, so the men walk to the 5th floor of the drill academy, walk up and walk back down. Then the companies—each man on the company—on both companies —I have two companies a day—each man puts it on and walks up and down the stairs.

Q. You mean you have five men in each company, is that correct?

A. Yes.

Q. And if you had two companies, then you had ten men?

A. Yes.

Q. And you had either one or two masks and ten men?

A. The second day I have two masks, right.

29 Q. Are you saying that the class—everyone in the class waits while one man puts on the mask and walks up to the—

A. No, we are discussing things.

Q. I am asking you now about putting on the mask, at what point in your instruction—

A. One man at a time walks to the 5th floor, and we are in a group there discussing things, and maybe

questions will come up that one of the men wants to know something.

Q. You mean while one man is walking up to the 5th floor, the others remain with you in the discussion?

A. That is correct.

Q. Now, these classes then, you have Firefighters or Firemen First Class, and their lieutenant, is that correct?

A. Yes, or it could be a captain.

Q. Or a captain?

A. Yes.

Q. And Muscare is a lieutenant, is that correct?

A. That is correct, yes.

Q. And you look to him as an officer to assist you, do you not—

A. Yes.

Q. —in drilling with the men—

A. Yes.

Q. —is that correct?

30 A. That is correct.

Q. And in fact, Lt. Muscare did cooperate with you and assist you in drilling the men, assigning them whatever roles had to be assigned in the drill?

A. That is correct.

Q. He cooperated fully with you on that?

A. Yes, he cooperated fully.

Q. Sure.

I believe you testified, near the end of your examination on direct, that you said after Muscare's company left, you reported something to someone.

A. I didn't say I reported, I said I had a discussion.

Q. With whom did you have a discussion?

A. Chief Prohaska.

Q. And what is his position?

A. Chief Prohaska is the Drillmaster.

Q. Well, you have discussions with him often, don't you, about the work going on in the academy?

A. Yes, sir, I do.

Q. Was Lt. Muscare the subject of that discussion?

A. Yes, he was.

Q. What did you say to Chief Prohaska?

A. I just mentioned about the beard that he had on his face.

31 Q. Do you call what Lt. Muscare has on his face a beard?

A. I call that a beard, yes, sir.

Q. Haven't you heard the word "goatee"?

A. I am not a qualified barber or hairdresser, I don't know a goatee from a beard, sir.

Q. You termed what he has as a beard?

A. Yes, sir, I would term that as a beard.

Q. And you also term what he has on his upper lip as a moustache?

A. From what I can see, I would say it is a moustache.

Q. Did you tell Chief Prohaska that he has a moustache?

A. No, I did not say he has a moustache.

Q. What is it then that you told Chief Prohaska concerning Lt. Muscare?

A. The discussion was about his beard. Due to the fact that he wears a beard, he wouldn't get a good seal on the face piece.

Q. You testified that he didn't put on the face piece, didn't you?

A. That is correct.

Q. So you don't know whether he could get a good seal or not, do you?

A. No, because I have no way of checking.

Q. So you don't know if he could get a good seal
32 on that or not, isn't that correct?

A. According to articles that I have read and tests that have been performed, men with facial hair will not get a good seal on their apparatus.

Q. I am not asking you now about articles you have read, I am asking you, is it not correct you have no immediate knowledge of whether Lt. Muscare could get a good seal or not? You did not see him put on the mask, isn't that correct?

A. That is right.

Mr. Sheridan: I will object to that question. I think the witness has been asked and answered the question. He basically stated that he never saw Lt. Muscare with the mask on. Based on the articles he has read, facial hair will interfere—

The Court: It has been asked and answered now. The answer may stand. The objection is overruled. I assume you are through with that particular question, Counsel.

Mr. Orlove: That particular one, yes, your Honor.

By Mr. Orlove:

Q. Isn't it a fact, Officer Johnson, that there are a number of factors that can affect a good facial seal?

A. That is correct.

Q. What are those factors?

A. Eyeglasses—

33 Mr. Sheridan: Your Honor, I will object to it as being immaterial. The issue here is whether or not

facial hair—well, I just feel whatever else might affect the seal seems to me to be not relevant, your Honor.

The Court: The objection is overruled. You may answer.

By Mr. Orlove:

Q. What other factors affect the seal on a face mask?

A. Eyeglasses, dentures, oddly shaped faces, or if a man had sores or boils along the face piece, he couldn't get a good seal there either.

Q. In fact, haven't you learned from your reading that turning the head affects the face seal?

A. Not if the face piece is secured, just by turning your head, no.

Q. Haven't you read that coughing or smiling affects the face seal?

A. No, I have not.

Q. When you mentioned dentures, aren't you really saying that some people have their face structured differently than others?

A. That is correct.

Q. There is a bone structure involved or a fatty skin tissue involved, and those factors may affect the seal?

34 A. Yes.

Q. And isn't it true, you have seen men come before you who could not get a perfect seal, by reason of a jutting jaw or some other characteristic other than hair that prevented a good seal? Haven't you seen that?

A. The men I have seen have all got a good seal. And I can tell it is a good seal, because when they kink the tube or use the bottom of the tube, the face

piece will collapse on their face and it will stay collapsed as long as they hold it.

Q. And that includes men that have come before you with moustaches, isn't that correct?

A. That is correct.

Q. They get a good seal?

A. That is correct.

Q. So then the articles you have read about face hair affecting the seal aren't wholly correct, as far as the moustache is concerned; you know that from your own observation, don't you? Isn't that correct?

A. That is correct.

Q. So you know that from your own immediate observation at your academy, some of the books you have read are inaccurate when they say that somebody with a moustache can't get a good seal?

Mr. Sheridan: Well, I will object, your Honor, the
35 question has been asked and answered.

The Court: The objection is sustained.

By Mr. Orlove:

Q. Mr. Johnson—or Officer Johnson, isn't it correct you have also had firemen come to you for instruction with, what one might term as sideburns, long sideburns, down to the middle or the bottom of the ears?

A. Yes, I have.

Q. And isn't it correct that you have seen these men put on the mask and obtain a good seal, even though they have sideburns, as what you consider long, to the bottom of their ear?

A. The Fire Department regulations say the sideburns will be to the middle of the ear.

Q. All right. I didn't ask you what the Fire Department regulations said.

A. Would you let me finish my answer? Do you want an answer?

The Court: Just a moment, the answer was not responsive. Restate the question.

By Mr. Orlove:

Q. Isn't it correct that firemen have come to your academy for instruction, having sideburns at the midpoint in the ear or to the lower lobe of the ear?

A. Yes.

36 Q. Firemen have come to your academy in that way?

A. Yes.

Q. And isn't it correct that they have put on the face mask, pursuant to your instructions, and have attained a good seal?

A. As far as I know, I mean I can't—I can't say definitely that it's a good seal.

Q. You are there to determine whether they are using the apparatus correctly, are you not?

A. That is correct.

Q. And wouldn't that be vital to the use of the apparatus to make sure that it is air-tight?

A. That is correct.

Q. So, I assume that you are checking the men that you instruct?

A. I certainly am.

Q. To determine whether they are obtaining an air-tight seal?

A. That I am.

Q. So that these men with moustaches and long sideburns are achieving a good seal?

A. Yes.

Q. And you have seen that yourself?

A. I have seen it, yes.

37 Q. In your reading, with respect to the face masks or self-contained breathing apparatus, have you also read that there is no such thing as a perfect, one-hundred per cent seal?

A. Yes, I have.

Q. That in every case, even one who is clean-shaven, there is an element of leakage, isn't that correct?

A. From what I have read, yes.

Q. You know, as a firefighter of many years, that a fireman cannot be clean-shaven immediately before a run or a call, don't you?

A. That is correct. We start work at 8:00 o'clock in the morning and we may get a run at 3:00 or 4:00 o'clock in the afternoon.

Q. And one may have a face stubble or some hair stubble of a beard, right?

A. It could be.

Q. And I am sure the Fire Department doesn't require their men to shave before they make the run, right?

A. That is correct.

Q. Do you recall ever coming across an article or reading an article from the Los Alamos Scientific Laboratory, from the University of California, concerning facial hair with the use of masks?

A. No, sir, I haven't.

38 Q. Have you ever come across any articles, or this one in particular, where you have read that small moustaches and small Vandyke beards will probably present no difficulty to a face mask?

A. No, sir, I haven't.

Q. Mr. Witness, if I may show you the booklet or the book that you identified in your examination.

Mr. Orlove: And with the Court's permission, if I may read the first sentence?

The Court: Go ahead.

Mr. Orlove: I would like to read it in view of the witness.

By Mr. Orlove:

Q. It says here, does it not, Mr. Johnson, that, "In recent years, a number of court cases developed when fire department personnel challenged orders requiring them to be clean-shaven in order that they could wear breathing apparatus face pieces safely."

Mr. Sheridan: Your Honor, I will object to that question. I think it is this Court's function to determine what the law is.

The Court: Well, it is. I have already read that section. I am aware that there is a division of authority, but I don't know that the witness' conclusion on

39 the point would be helpful, Counsel.

Mr. Orlove: I will withdraw the question, your Honor.

The Court: All right.

By Mr. Orlove:

Q. I assume, Officer Johnson, that you have had actual firefighting experience?

A. Yes, sir, I have.

Q. And have you ever operated under firefighting —actual firefighting conditions with face masks and breathing apparatus?

A. Yes, sir, I have.

Q. Then you know, do you not that before each instance when a man would put on the equipment, it should be tested each time, is that correct?

A. That is correct.

Q. And that no man would go in and use that equipment if there was any leakage, is that right?

A. Either leakage or a malfunction in the apparatus.

Q. Then one certainly would not use that equipment, the Fire Department wouldn't request them to use that equipment?

A. That is right.

Mr. Orlove: Nothing further, at this time, your Honor.

The Court: Any redirect, Counsel?

Mr. Sheridan: Just a few questions.

40 *Redirect Examination by Mr. Sheridan.*

Q. Mr. Johnson, look at Exhibit 2 for identification; and I ask you if you recognize that?

A. Yes, I do.

Q. Tell us, briefly, what it is?

A. That is a tape recording that is played along with the slide program.

Q. And in your testimony, you also mentioned something about some of the other information that you read, was the American National Standards Institute publications, is that correct?

A. Yes, sir.

Q. I would like to show you what has been marked as Defendant's Exhibit No. 2; and ask you if you recognize that document?

A. Yes, sir, I do.

Q. Is that the document you are referring to?

A. Yes, sir, this is the one I am referring to.

Mr. Orlove: I object to those, your Honor, being offered at this time on redirect examination.

The Court: I don't know whether they have been offered or not.

Mr. Sheridan: Your Honor, I would offer them.

41 The Court: Well, the recording, we have already heard testimony as to what is on the tape, I don't think it adds anything to the evidence we have already heard.

What is the booklet or whatever the document was?

Mr. Sheridan: Your Honor, the other document, I will hand to the Court, your Honor.

The Court: Yes. All right. Over objection you may introduce that document at this time. Give it to counsel, he may wish to cross examine further on it. And I will allow him to do so.

Mr. Sheridan: I have no further questions.

The Court: The offer of this tape is refused. There is a reference—

Mr. Orlove: I beg the Court's pardon, I didn't hear the Court's ruling.

The Court: I said, over objection that document may be admitted. The tape is refused. And I call your attention to Page 9, which has a crucial section here. And I said you may cross examine additionally on that, if you wish.

(Whereupon, the document previously marked Defendant's Exhibit No. 2, for identification, was received in evidence.)

42 Mr. Orlove: I might say, your Honor, perhaps, on or off the record, we had no—of course, this is an expedited proceeding, we had no indication what tack the Government was going to take in its defense. So if I could indulge the Court and ask for some time—

The Court: You may, Counsel, but I just saw it for the first time—I think there is only two sentences in

there that are relevant to the issues here. And I am sure you can glance at them and then cross examine further, if you to, on them.

Mr. Orlove: Thank you, your Honor.

Just, perhaps, a few questions, your Honor.

If I understand the Court, this pamphlet is going into evidence?

The Court: Yes, it is.

Recross Examination by Mr. Orlove.

Q. Officer Johnson, when did you first see the document which is in evidence, as Defendant's Exhibit No. 2?

A. I saw that when I first started giving my instructions.

Q. When was that, sir?

A. Approximately five months ago.

Q. So that would be some time in November, is it, or October?

43 A. Right, some time in November.

Q. Are you sure of that?

A. Yes, I am.

Q. I direct your attention to the inside page, which indicates the date here of "Approved, January 8th"—I'm sorry, I withdraw the question.

Having looked this over and I haven't had time to read the whole thing, can you tell us if, anywhere in Defendant's Exhibit 2, there is a definition of beard?

A. There is no definition, no.

Q. And the document says, sideburns, unusual facial contours; is there any definition or description or pictures in here of what is considered a beard?

A. No, sir, there isn't.

Mr. Orlove: No further questions, your Honor.

The Court: Anything further from this witness?

Mr. Sheridan: Your Honor, if I may make this statement with respect to the City's—Defendant's Exhibit 2. I have heard that—and my purpose in offering it was that when they speak of the—on that tape, when they speak of—

Mr. Orlove: I object to the remarks as to what the tape says. The tape is not in evidence.

The Court: Well, I don't think it is important to put it into evidence, Counsel. It has been refused and

44 I won't reverse that ruling.

Mr. Sheridan: Fine, your Honor.

The Court: 1 and 2 have been admitted.

Is there anything further.

Mr. Sheridan: Nothing further.

Thank you, Mr. Johnson.

The Court: You are excused, sir. Thank you.

(Witness excused.)

The Court: Call your next witness.

You recall, sir, that you were administered an oath earlier?

The Witness: Yes, sir.

The Court: And your name, please?

The Witness: Al Lundin, A-l, L-u-n-d-i-n.

The Court: Your address, sir?

The Witness: 1345 Michelle.

The Court: Is that Chicago?

The Witness: Palatine.

The Court: And your business or occupation?

The Witness: I am District Sales Manager for Mine Safety Appliances Company.

The Court: Go ahead, Counsel.

45 AL LUNDIN, called as a witness on behalf of the defendant, having been previously duly sworn, was examined and testified as follows:

Direct Examination by Mr. Sheridan.

Q. Can you tell the Court what Mine Safety Appliances Company is, please?

A. They are a manufacturer, located in Pittsburgh, of devices for personal protective devices of various kinds, such as hard hats, goggles, dust respirators, instruments for detecting toxicant materials.

Q. Now, does your company sell various self-contained breathing apparatuses to any fire department?

A. Yes, sir.

Q. And in this area, can you tell us what departments or city agencies you sell these apparatuses to?

A. Yes, most of this is done through fire department distributors, in some cases we do sell direct, but generally through fire department distributors located throughout the country.

Q. Does your company furnish the City of Chicago Fire Department with any self-contained breathing apparatus?

A. Yes, sir.

Q. Now, in addition to being District Sales Man-
46 ager for Mine Safety Appliances, do you teach any course with respect to the safety aspects of these safety devices?

A. Yes, I do.

Q. Can you tell us where you teach this course?

A. At the National Safety Council here in Chicago.

Q. Briefly, can you tell us what the National Safety Council is?

A. This is probably the safety organization in the country that coordinates record-keeping, dispenses information to—it has various sections, industrial sections, mining sections, chemical sections, home and farm sections, agricultural sections.

Q. Can you tell us what subject you are associated with with that institution?

A. All right. I teach basics of respiratory protection to the basics of industrial hygiene group to the Council.

Q. And does your teaching in all encompass the field of self-contained breathing apparatuses?

A. Yes, it does.

Q. Can you tell us who attends these classes?

A. Generally safety directors, really from throughout the world, but primarily from various companies throughout the United States, major companies, as well as small companies.

Q. Generally can you just tell us what fields are encompassed when you conduct these classes?

47 A. A large part of the class is taken up with current laws governing the selection and use of respiratory devices. And then actual samples are on hand and we discuss the three main basic types of respiratory devices from the mechanical filter, small mechanical filter apparatus into a self contained breathing apparatus.

Q. Now, with respect to the law, is the Occupational Safety and Health Act in any way involved?

A. Yes.

Mr. Orlove: Objection, your Honor.

The Court: What is the basis for the objection, Counsel?

Mr. Orlove: Well, counsel seems to be eliciting testimony now with respect to the witness' legal conclu-

sions or conclusions as to the state of the law, which is not appropriate.

The Court: Well, it isn't, but maybe he knows more about the Occupational Safety Act than we do. Let's hear him and we will decide, in any event.

Go ahead.

The Witness: What was the question?

Mr. Sheridan: You do, is that correct?

The Court: Is the Occupational Safety Act in any way involved; and I think the answer was yes. Go on from there.

48 The Witness: Yes, very much so. It is now the outgrowth of the William Steiger Act, which was intended to add additional protection to the industrial—and I believe—municipal worker in the United States. So it became law on, I think, April of '71, I believe, the Occupational Safety and Health Act.

By Mr. Sheridan:

Q. What standards are used? Do they refer to any standards in that act?

A. Yes. As a matter of fact, the standards were set up—the standards references within the act were set up prior to the law coming into effect. So that the law, for the most part, either references standards already in existence—

Q. What standards would they be, can you tell us?

Mr. Orlove: Your Honor, again I would like to object, for two reasons. Number one, when we are talking about standards set forth in an act, the act is available for all of us to read, as lawyers and judges. Number two, as I am listening to the testimony there does not seem to be any connection made with respect to the facts in this case.

The Court: I don't see it yet, either.

But I assume, Counsel, that you intend ultimately to—well, there is no jury here—let's discuss this? Where are you heading with this, is there an incor-

49 poration of the National Safety Council standards into the act; is that what you are leading to?

Mr. Sheridan: Well, it's my understanding, your Honor, that within the Occupational Safety and Health Act, they encompass the standards of the American National Standards Institute.

The Court: All right. Is this witness going to be able to testify to your expectation that there is some such standard that will apply precisely to this face mask question? Is that what you expect now, I assume that is where you are heading?

Mr. Sheridan: Well, it was my impression, your Honor, that this in some regards was the American National Standards Institute.

The Court: I see. All right, then over objection, you may go ahead. This is leading up to some connection with your Exhibit 2, I assume?

Mr. Sheridan: Yes, your Honor.

The Court: All right. Go ahead.

By Mr. Sheridan:

Q. Mr. Lundin, we'd appreciate it if you'd look at Exhibit 2; and are those the standards you refer to, with respect to the standards that were adopted or referred to by OSHA?

50 A. Yes, sir.

Q. Now, during the conducting of your classes, do you have any occasion to discuss with them the obtaining of a facial seal on self-contained breathing apparatuses?

Mr. Orlove: Your Honor, again I object, because if where it is taking us, we have no foundation of a connection in this case that Chicago Fire Department officials or personnel are subject to or bound by Mr. Lundin's interpretation of OSHA or his lectures.

The Court: Let me ask, Mr. Lundin, whether you are familiar with the self-contained breathing apparatus that is used by the Chicago Fire Department?

The Witness: Yes, your Honor.

The Court: Is it your company or your sales effort that has had something to do with their buying this equipment?

The Witness: No, these were sold through our distributor.

The Court: But you are familiar with the equipment that they use and which has been the subject of earlier testimony? I note that you were in the courtroom during the earlier testimony?

The Witness: Yes, your Honor.

The Court: Then with regard not to the general
51 face masks or anything of that sort, and limiting your answers to this particular equipment used by the Chicago Fire Department, with which you are familiar, you can go ahead on that line.

Mr. Sheridan: Okay.

The Court: Let the record indicate that it is over objection, so that counsel may make his record.

By Mr. Sheridan:

Q. With respect to the self-contained breathing apparatuses used by the Chicago Fire Department, can you tell the Court what, if any, in your opinion, would be the effect of facial hair on obtaining a facial seal?

Mr. Orlove: I object to an opinion by this individual, as not being qualified as an expert.

The Court: Over objection, you may answer. Go ahead.

By the Witness:

A. Yes, I rather firmly take the stand that facial hair, by law, by the ANSC standards, and from my own observations would affect a facial seal.

By Mr. Sheridan:

Q. Can you tell us in what manner it would affect a facial seal?

A. It's looked upon as a facial seal being the main point that has to be obtained in any type of respiratory
52 device, whatever type it might be—and this is brought out in, I guess, various studies that have been made—without affecting this seal, you cannot only conceivably affect the operation of the apparatus, but certainly your breathing toxic materials or the possibility of breathing of toxic materials through the face piece and into the wearer.

Q. Now, if someone places an order with your company and obtains a certain type of self-contained breathing apparatus, they come in standard sizes, is that correct?

A. Correct.

Q. And do these sizes fit all people?

A. We certainly intend that they should. There may be—I think we say something on the order of ninety-seven, ninety-eight per cent of all the people we expect to fit them with, yes.

Q. Now, if one person were to be able to obtain a seal with some facial hair, would that necessarily mean that all others would also?

A. No, this has to do with the facial—different facial sizes and shapes and so forth. So that you can say

that an individual who could form a seal, with the variously shaped moustache or whatever, doesn't mean that that same size moustache or beard on another type of face would affect a seal. And I have noticed a tremendous variance, where you have a big, heavy-set face versus the narrow smaller face, on the position-
53 ing of the face piece on the face. It makes a tremendous difference.

Q. Would the presence of facial hair even if a person—assume a person were to obtain a seal, would the presence of facial hair in any way affect his ability to maintain that seal?

A. Yes, I would say so.

Q. Why would you say so, sir?

A. Well, it's bound to. As I mentioned before, it is very difficult to form a seal to the face under the best conditions, and facial hair of any type is going to endanger that. And to the extent that, perhaps, you can affect a seal, but the seal is not as strong. So that as he would do various things during his operation, this seal could be broken conceivable—or more easily broken.

Q. Mr. Lundin, is it correct or incorrect that sometimes the only person who can tell if there is an effective seal would be the person wearing the mask?

A. That is correct.

Q. That is correct?

A. Yes.

Q. And approximately on the—or where does the seal end, in relation to the neck, can you tell us that?

A. It is going to vary considerably with the facial type of the individual.

54 Q. Do you have any publication or sales brochure which would indicate the type of mask worn by the Chicago Fire Department?

A. Yes. There are three main types, all of them within the Chicago Department; that is, different styles of manufacture. This is the more recent one. And then you have what you call a clear-view.

Mr. Sheridan: Would you please mark this as Defendant's Exhibit 4?

(The document was thereupon marked Defendant's Exhibit No. 4 for identification, 3/19/74.)

By Mr. Sheridan:

Q. I would like to show you Exhibit 4, and that is the publication of MSA that you were looking at, is that correct?

A. Yes.

Q. Can you identify for the Court, please, the pages on which the mask that the Chicago Fire Department has?

A. All right. That is on Page 24, is the Chicago Fire Department mask. And you can get—did you want these other face masks too?

Q. If you will just name a page and point out the one that the Chicago Fire Department has?

A. Page 24, the Chicago Fire Department has.

55 Q. Now, you indicated—is that the exact—are there any variations in the self-contained breathing apparatus that the Chicago Fire Department has, opposed to the photograph shown on Page 24 of this publication?

A. No.

Q. Are there any other pages where the Chicago Fire Department has some of this equipment?

A. Yes, I believe there are. Page 23, the Chemox mask represents another type. However, the ones that the Chicago Fire Department has do have different face pieces than the one pictured.

Q. So you have indicated Pages 23 and 24; are there any other masks that you know that the Chicago Fire Department has?

A. I don't believe so, you may have some of the older styles of that shown on Page 24.

Q. Now, are the stylings of these masks changed at various times through research and development or one thing or another?

A. Yes, they are. More through changes in the laws, or one thing or another.

Mr. Sheridan: Your Honor, at this time, I would like to offer this as an exhibit.

Mr. Orlove: I object, your Honor, because just a picture of the mask, I don't think it tells the Court
56 anything. There is really a serious question as to whether this witness has any direct knowledge of what the Chicago Fire Department has.

The Court: He has testified that he has.

So what it's worth, it may be admitted, over objection.

Mr. Orlove: Did the Court say it will be received?

The Court: Yes, it may be admitted for whatever it may be worth.

(The document previously marked Defendant's Exhibit No. 4 for identification was received in evidence.)

The Court: It isn't as good as a mask, but it is better than nothing.

Go ahead, Counsel.

By Mr. Sheridan:

Q. Mr. Lundin, based upon the mask that the Chicago Fire Department has in operation, do you have an opinion whether or not the presence of a goatee—such as worn by the plaintiff in this case—would adversely affect—whether or not it would adversely affect the obtaining and maintaining of a good facial seal on a self-contained breathing apparatus?

Mr. Orlove: I object, your Honor.

57 The Court: Over objection, you may testify. Do you have such an opinion?

The Witness: Yes.

The Court: And what is it?

The Witness: I would be very skeptical of it, yes, of being able to maintain a good seal.

Mr. Sheridan: I have no further questions of the witness?

The Court: Do you wish to cross examine, Counsel?

Mr. Orlove: Yes, your Honor.

Cross Examination by Mr. Orlove.

Q. Is it correct, you do work for MSA Company?

A. Yes, sir.

Q. And if I understand your testimony correct, you do not sell masks directly to the Chicago Fire Department?

A. No, we deal—we go through a distributor here.

Q. And as far as you know, perhaps the Chicago Fire Department buys from a distributor in Chicago or elsewhere?

A. Right.

Q. And you don't have that information?

A. No—well, at the time it occurs, it generally goes out on a bid-type of thing, we are aware of this through the distributor, we are aware of it.

58 Q. You are not certain what equipment they may have from other sources?

A. Oh, no.

Q. Who asked you to testify today?

A. Chief Foley.

Q. Chief who?

A. Foley.

Q. What did he tell you about this case?

A. Very little, other than—in fact, I didn't learn of it until last evening, late yesterday afternoon. And he asked if I would come in and stand by if asked to submit testimony.

Q. Of course, you have never met Mr. Muscare or Lt. Muscare before?

A. No, sir.

Q. He is the man sitting at the counsel table.

A. Not to my knowledge, no.

Q. And, of course, you have never seen him put on either your mask or other manufacturer's equipment?

A. No, sir.

Q. Is that correct?

A. No, sir. That is right.

Q. Now, did I understand you correctly that you said any hair of any type will affect the seal?

59 A. I have to be very suspicious of it. I would suspect that it would affect the seal.

Q. Any facial hair?

A. Well, you are splitting hairs there. Pardon the pun?

Q. Pardon the pun?

A. Yes. Well, I have to be suspicious of it. Certainly anything that is going to interrupt that seal is not desirable. And now it becomes, I suppose, a matter of degrees. So if I have to make a statement, and I do have to make a statement, in schooling and so on, I try to get rid of the idea that hair is not a good thing, it interrupts and interferes with a good seal.

Q. You were in the courtroom, were you not, when Officer Johnson testified as to instances he has personally seen where men with moustaches have tested the equipment?

A. Yes.

Q. And they have attained a good seal?

A. Yes.

Q. Does that surprise you or shock you?

A. Oh, no, not at all.

Q. So then it is possible for facial—for one with facial hair to attain a good seal?

A. Correct.

Q. In fact, isn't it also possible that one with hair
60 on his chin, as opposed to a moustache, could also attain a good seal?

A. Yes, it's possible.

Q. Doesn't it depend on the face?

A. A great deal on the face.

Q. The structure of the face, is that correct?

A. Well, that is one of the things, yes.

Q. Or the size of the jaw, if one were to be wearing hair on his jaw, isn't that correct?

A. That is right, yes. That is one of the reasons I have to be suspicious, because of the various sizes of the face.

Q. Well, being suspicious—and I suppose you mean you are personally suspicious, your own idea that you are suspicious?

A. Well, may I respond to that?

Q. Well, let me ask you a question first?

A. All right. Fine.

Q. While being suspicious, you recognize that there is a possibility that one with a small goatee may still attain a good seal?

A. Certainly.

Q. One with a moustache may attain a good seal?

A. Certainly may, yes, they may.

Q. Then, by looking at Lt. Muscare, as he is sitting here, you can't tell whether he could get a good seal
61 or not, can you?

A. No, this was my indication, I suspect there would be problems.

Q. But you don't know?

A. No.

Q. Isn't it a fact that every man who becomes familiar with the equipment of self-contained breathing apparatus should determine for himself whether he has a good seal?

A. Because of the nature of the test, he is really the only one that can tell whether he has a good seal.

Q. Really, there is another reason too; isn't it that he is the man that is going to go into an adverse or dangerous situation and risk his life with toxicity and smoke inhalation?

A. Well, what he is doing—

Q. He is the one that has to secure in his own mind that he can live with that mask on?

A. Well, he is checking out the apparatus and to be sure that it is operating functionally and it is operating properly with the apparatus, or it is operating properly on him, and this is the purpose of the test that he is conducting.

Q. So if a man were to say to you, I have put on the mask and I know how it works and I have a good seal, you would be confident in that remark, wouldn't you?

A. Yes.

62 Q. You wouldn't question the man, would you?

Mr. Sheridan: Well, I will object, your Honor, whether he would question a hypothetical man under a hypothetical situation.

The Court: Objection sustained. You made your point.

Mr. Orlove: Your Honor, all of the direct examination has been hypothetical.

The Court: It's true, but I don't think it is relevant whether an individual can get a good seal, no matter how much facial hair he has. It is relevant whether the Fire Department can reasonably prohibit facial hair in the interest of getting a good seal. The individual case is illustrative, but I think you have gone as far with it as you can.

By Mr. Orlove:

Q. You are aware, are you not, that there are other factors that can affect the seal, besides facial hair?

A. Yes, sir.

Q. And what are those?

A. I think Mr. Johnson spelled them out very well. Eyeglass frames or temples, lack of dentures, possibly.

Q. Coughing?

A. No, as a matter of fact that doesn't necessarily interrupt the—affect the seal. During the tests required

63 by the Bureau of Mines, and now apparently NIAC, this is one of the tests required to be passed on before an apparatus can be certified or receive an approval is to wear it into—you actually put individuals—there is bench test, then they put individuals into an odorant—a room full of odorants and they are required to go through a number of actions, including chewing and talking and various things. And should they detect any odorant coming through, then that is an indication of, perhaps, they better leave. So really this is one of the things they want to watch for is that they can maintain a seal while an individual does normal things, such as coughing and talking and so on.

Q. Haven't you observed or read among various studies some writers have given an opinion that a small moustache and a small goatee probably will not affect the seal?

A. I can't say that I have read that, no. I have read a number of—I try to read as much of the stuff as I can, and do read a lot of it. I can't specifically recall having seen that. But certainly I have no reason to doubt it.

Q. Pardon?

A. I have no reason to doubt it.

Q. I believe you said that there have been some studies that indicate that perhaps the standard-sized mask will not fit three per cent of the population; did
64 I understand that correctly?

A. Yes. I would hate to be held to that figure, but it is certainly in that area.

Q. In those studies do they indicate what types or what varieties there are that make up that three per cent figure?

A. Not to my recollection, I don't recall that specifically.

Q. Isn't it correct that there is no such thing as a perfect seal at all times, an absolute 100 per cent seal?

A. I understand that, yes, from personal observation, putting them on and where you go through the operation that Mr. Johnson mentioned—which is recommended procedure—and when you inhale and hold that tube, you can feel no leakage at all and you feel the tube—the face piece extending, I feel that I can hold it twenty-four hours, if I can hold my breath that long, it feels like there is absolutely no leakage at all and it is sucked tightly to the face, to me that is a perfect seal. I understand then can hook up with the equipment and detect in the parts-per-million range for various odorants that are being introduced around the face piece, I guess, and determine that in a parts-per million range, they can pick up leakage inside this face piece. And I have no reason, again, to doubt these studies, I assume they are true. I am sure they are.

65 Q. Do you have any knowledge or recollection as to when the City of Chicago purchased these masks from your distributors?

A. Well, they have had masks of ours that go way back, long before my time, here in the City of Chicago. The most recent purchase was, I believe, this past fall, I would say fall through winter.

Q. Fall through winter of 1973-74?

A. Yes, I am thinking—I don't recall just exactly when the purchase was, delivery was continuing, I think the purchase was made last summer, I wouldn't swear to that.

Q. Has delivery been completed, to your knowledge?

A. To my knowledge, it has.

Q. Do you know the quantity of that order?

A. I believe it was 150 apparatuses.

Q. 150 face—

A. Complete apparatus.

Q. There is more than 150 firemen in the Chicago Fire Department, aren't there?

A. Oh, yes.

Q. Do you know anything about this particular purchase, was it designed to equip every firefighter with his own mask?

A. I have no idea.

Q. The most recent purchase was the 150 items?

66 A. Yes.

Mr. Orlove: No further cross examination.

The Court: Any redirect?

Redirect Examination by Mr. Sheridan.

Q. You indicated you were contacted yesterday afternoon by the Fire Department, is that correct?

A. Right.

Q. Have you ever been contacted at any other time recently with respect to a similar issue?

A. By the Fire Department?

Q. No, by anybody else other than the Fire Department.

A. On similar mask problems?

Q. Similar circumstances, yes.

A. Just generally mask problems?

Q. Yes.

A. Yes.

Q. Just within the last three weeks, have you received any phone calls from anyone?

A. Oh, yes, I did.

Q. Approximately how long ago was that?

A. A week ago, I would say.

Mr. Sheridan: I have no further questions, your Honor.

67 Mr. Orlove: Nothing further.

The Court: You are excused. Thank you.

The Witness: Thank you, your Honor.

(Witness excused.)

Mr. Sheridan: I just have one last witness, your Honor.

The Court: All right. Call him.

You have already taken an oath?

The Witness: Yes, sir.

The Court: All right. And your name, please, sir?

The Witness: William F. Foley.

The Court: And your rank in the Fire Department?

The Witness: I am the Acting Chief Fire Mashal.

The Court: I assume that answers your business or occupation.

Go ahead, Counsel.

WILLIAM F. FOLEY, called as a witness on behalf of the defendant, having been previously duly sworn, was examined and testified as follows:

Direct Examination by Mr. Sheridan.

Q. Chief Foley, did the Chicago Fire Department recently obtain some additional self-contained breathing apparatuses?

A. Yes, sir, they did. During the calendar year 1973

68 we purchased 150 complete units.

Q. And for the year 1974, do you have any idea how much money has been budgeted to the Chicago

Fire Department for the purchase of additional self-contained breathing apparatus?

A. For this year? No, sir, I couldn't tell you the dollar amount. We do have funds available for breathing gear, yes, sir.

Q. Do you know what the amount was for 1973?

A. No, offhand, I couldn't give you an exact dollar amount, but the average price-per-unit is a little short of $400. So you could multiply 400 by 150 and you arrive at the budgeted figure. We did spend all of the budgeted figure for the appropriation of gear.

Q. Now, with respect to the duties of a lieutenant in the Fire Department, would such a person have as much cause to use this apparatus as any other fire-fighter within the Department assigned to a working unit?

A. Yes, sir.

Q. Now, with respect to the—the Chicago Fire Department does not have enough masks, self contained breathing apparatus for each fireman, does it?

A. That is correct. There was no intention ever to do this.

Q. Can you tell the Court how the Fire Department
69 has distributed the self-contained breathing apparatuses that they do have?

A. We originally adopted a self-contain breathing apparatus program back in 1958. At that time the distribution of gear was two masks per hook and ladder company, five masks per squad company. Now, over the years, we have developed a new mask, new equipment and we have augmented this when we retired some of the older masks. At the present time Inventory Control assigns to each hook and ladder two self-

contained breathing gears. Now, I am not saying specifically the type in question here, but there are two breathing gears assigned. Some trucks temporarily may be out of masks, due to the fact that they are in for repair and so forth and there is not enough back-up to maintain the two-per-unit level.

In addition to this, we have equipped, at the present time, some twenty-four companies, engine companies with two masks apiece of the later design. Our intention is—in addition to this we have six flying squads—seven flying squads, who carry six masks apiece. We also are introducing one self-contained breathing gear to each chief officer's car, at the Battalion level. At the present time, we only have three or four of these in service.

Our ultimate aim, though, is complete coverage of the job, pending acquisition of the proper amounts of
70 material.

Q. Chief Foley, with respect to the wearing of the self-contained breathing apparatuses, what does the Chicago Fire Department do with respect to facial hair?

A. Well, we would like the men clean-shaven.

Mr. Orlove: I will object to the question, your Honor, because we have—

The Court: We have the regulation before us and I have read it and I know what it is. So if the witness is going to repeat the regulation, it is unnecessary. Of course, what they like is not too relevant either. So I will sustain the objection.

Mr. Sheridan: I understand, your Honor.

I have no further questions, your Honor.

The Court: Any cross examination of Chief Foley?

Cross Examination by Mr. Orlove.

Q. I am always worried about using the wrong title. How shall I term you "Chief"?

A. Yes.

Q. Chief, you say currently there are supposed to be two masks on each hook and ladder?

A. Yes, sir.

Q. And that is every single hook and ladder?

71 A. All hook and ladders are assigned two masks.

Q. Do you know that there are some hook and ladders that don't have masks at all?

A. I mentioned that before?

Q. Yes, I think you said some are in for repair.

A. Right.

Q. And repair might take months, doesn't it?

A. Availability of parts and labor to repair them.

Q. In fact, hasn't it come to your attention that some hook and ladder trucks never really got masks?

A. That is not true.

Q. How many men are assigned to a hook and ladder truck?

A. There is two different levels of manpower assignment, depending upon the area the truck is protecting. We have five-man companies and four-man companies under the present manning levels dictated us by outside consultants. The particular company involved, is a five-man company.

Q. And you say the "particular company involved", the company—

A. Lt. Muscare's company.

Q. The company in which Lt. Muscare works?

A. Yes, sir.

Q. Is lieutenant the highest officer in the company?

A. No, sir, a captain.

72 Q. I see. What is the scope of Lt. Muscare's—or a lieutenant, but a lieutenant like Lt. Muscare—his operation?

A. The lieutenant commands the company unit or platoon on his platoon in the absence of the commanding officer, the captain.

Q. Is the hook and ladder—does the hook and ladder truck consist of the company itself?

A. Yes, sir.

Q. So his company is a five-man company?

A. Five-man per shift, sir.

Q. I see.

A. Five men per shift. It is staffed on the basis of providing five men each day, each working day on that company, yes.

Q. And he is the chief official for that company on that shift?

A. Yes, sir.

Q. And when you use the number "five", does that include the lieutenant or exclude him?

A. No, that includes the lieutenant.

Q. So you have two masks designed for use by five men in the company?

A. Yes, sir.

Q. I take it by that, obviously, that not everybody fighting a fire in the company is going to be required

73 to use a mask, they may be assigned other duties that don't require a mask, is that correct?

A. Yes. All members are required to be proficient in the use of the mask.

Q. I understand, but—okay, I understand.

But a company might assign men to different areas in fighting a fire?

A. Yes, sir. The company officer would give orders, at his discretion, on the fire-ground problem.

Q. I didn't hear the end of your answer, sir.

A. The commanding officer of the unit may give various orders, depending upon the fire-ground problem.

Q. And is it correct, that usually the lieutenant is in charge of that company and issuing orders to the men to do one job or another?

A. Yes, sir.

Q. Chief, when did the action that was taken with respect to Lt. Muscare first come to your attention?

A. It came to my attention on the 21st of December. The first time it was brought to my attention is when I received messenger mail concerning this incident.

Q. Chief, do I understand your testimony correctly, that since 1958 every hook and ladder truck has had two masks assigned to it?

74 A. No, sir, I didn't say that. I said starting in '58 we started the program for breathing gear and the ultimate goal was two per truck. Eventually, this was realized. Since that time, some of the gear has fallen into disrepair and some trucks are short at this time. But the overall administrative policy is two masks per truck.

Q. And at what point in time did you realize the goal of two gear—two masks per truck?

A. Well, I believe that back in the early '60's all trucks had Chemox masks, which is another type of breathing—it's merely a trade name, but it is a self-contained breathing apparatus.

Q. And are those now out of use, Chemox masks?

A. No, sir, they are not.

Q. They are also used?

A. Yes, sir.

Mr. Orlove: No further cross, your Honor.

The Court: Any redirect?

Mr. Sheridan: Briefly, your Honor.

Redirect Examination by Mr. Sheridan.

Q. Chief, did anything happen to you personally after December 21st?

A. Yes, sir, Christmas night I was a victim of emer-
75 gency appendicitis operation.

Q. So you were incapacitated approximately when?

A. I came back to administrative duties on February 10th or the 12th, I'm not sure without referring to the records.

Q. And did you have any conversation with Chief Prohaska on or about February 21st, 1974?

A. Yes, sir, I did. It was brought officially to my attention by him.

Q. That is all. And Lt. Muscare, he is assigned to a hook and ladder company, is that correct?

A. Yes, sir.

Q. Now, is it the policy of the Fire Department to have—strike that.

Are the self-contained breathing apparatuses—are they normally worn by the firemen at all fires or are they just used in somewhat of an emergency or unusual circumstances?

A. No, generally they are at the direction of the company officer.

Q. Under what circumstances would a company officer order men or he himself put on the self-contained breathing apparatus?

A. Well, rescue would be one condition under hostile environment. Certainly I would use a mask in irrascible type atmosphere, some of which would be highly toxic, poisonous gas, for instance.

76 Q. And is there any policy of the Chicago Fire Department to attempt to have some masks available at any given type of fire?

A. No, there is not a set policy as to the number of masks.

Q. But do certain number of vehicles respond to certain types of fires?

A. Yes, sir. There is a predetermined response to ordinary call for help, yes.

Q. Now, is there any policy in the Chicago Fire Department with respect to taking into consideration how many masks are on each vehicle—as to how many masks they would hope to have at each type of fire, depending on its size and nature?

A. Yes, sir. You mean our administrative goal to try to reach the ultimate—

Q. I am just saying at a certain type-size of a fire.—

A. Yes.

Q. —certain number of vehicles will respond to that fire—

A. Right.

Q. —has the Chicago Fire Department given any consideration with respect to the type of vehicles responding as to how many masks or self-contained breathing apparatuses will be present at that fire?

77 A. Yes, sir.

Q. Are these masks generally located on the same place of each vehicle?

A. It's impossible to do, because the vehicles themselves—

Q. I am referring to same types of vehicles, say hook and ladders?

A. I am also referring to them. All hook and ladders are not the same. All engines are not the same.

Q. With respect to the style of the vehicles, is the style the same generally or generally not?

A. We have tried to standardize as much as humanly possible.

Mr. Sheridan: I have no further questions, your Honor.

Recross Examination by Mr. Orlove.

Q. Chief Foley, in this case we are concerned with the suspension of Lt. Muscare, what officer—what is the lowest rank officer in the Fire Department that may suspend an employee of the Fire Department?

Mr. Sheridan: Your Honor, I will object to that. I think that is covered by Section 10-1-18 of Chapter 24½ of the Illinois Revised Statutes.

78 The Court: It is outside of the scope of the prior examination. What do you have in mind, Counsel? I don't want to foreclose you on anything relevant. I have the suspension before me, it's Exhibit C, which I think you attached to your complaint.

Mr. Orlove: Just the question that counsel raised on redirect as to his unavailability during certain periods of time.

The Court: I didn't understand the reason for that myself.

Mr. Orlove: I took it to be going to the allegations in the complaint as to a conversation that occurred, and, an allegation sworn to by affidavit, a conversation occurred in December and the suspension taking place later in February.

The Court: I see. All right, then go ahead into the matter, if you wish.

Could someone else have signed the suspension order or directed the suspension during your illness, someone else in the Department?

The Witness: Well, I am confused here, your Honor. You are saying it was a conversation in December. There was not, not involving me.

By Mr. Orlove:

79 Q. I wasn't directing that to you, Chief, but to the Court.

I just wanted to ask you—you are Acting Chief Fire Marshal, is that correct?

A. Yes, sir.

Q. Now, isn't it true that subordinates of yours, namely, a captain or battalion chief or division marshal have authority within the Fire Department rules to suspend an individual?

A. No, sir, they could file charges, the suspension would rest in the Commissioner's Office.

The Court: I assume that while you were home ill that somebody else had authority to file—

The Witness: Yes, sir.

The Court: —to order a suspension?

The Witness: There was another man that took my place.

The Court: All right. Is there anything else, Counsel?

The Witness: I follow the counsel's line there. The man that took my place, I don't believe was aware of this, because the mail went into my desk and this man didn't use my office. And I don't feel he was really aware of this paper that was in the process.

By Mr. Orlove:

80 Q. When you say "aware", you mean aware of the appearance of Lt. Muscare?

A. I don't believe the man who took my place, Chief Williams, even knew that there was charges preferred or that there was anything at all in the mill on this.—

Q. Were there charges?

A. —due to the fact it came to me on a holiday weekend, I put it in my office, I left it there. And the 24th was a holiday, I did not come back to work. And Christmas night I was taken sick. And it went on until I came back to work. In the meantime it held in abeyance. This was my own opinion, the man who took my place wasn't aware that there was a set of charges, active set of charges on my desk.

Q. Were there a set of charges on your desk?

A. Yes, sir, they were.

Q. Were you in communication with your office, when you were at home recuperating?

A. Was I?

Q. Yes.

A. No, sir, I was not.

Q. Do you have these charges with you in this courtroom?

A. No, sir, I don't.

Q. Pardon?

A. No, they are the charges that you see here, I believe.

81 You said there were a set of charges there, your Honor.

The Court: I said this was a suspension notice.

The Witness: I'm sorry.

The Court: This is what I am referring to, if this will assist you in your testimony.

The Witness: Yes. Well, this is a suspension notice that goes out from the Personnel Department and not from my office.

The Court: The question is, did anyone give you written charges against Lt. Muscare?

The Witness: Yes, sir, they did.

The Court: All right. And that was a day or two or a few days before you went home and took sick, is that right?

The Witness: Yes, sir.

The Court: All right. Now, counsel is asking if you know where those charges are, the written charges, the document.

The Witness: Yes, sir, they are in the Bureau of Personnel.

The Court: How did they get there, did you forward them?

The Witness: When I returned back to duty, I for-
82 warded them down to the Chief of Personnel, Chief Brown.

The Court: All right. Thank you.

Anything further, Counsel?

By Mr. Orlove:

Q. With respect to the matter of Lt. Muscare, is it correct that you never spoke to him personally—

A. No, sir.

Q. —from December to February?

A. In this matter, no, sir. In January—

Q. I am talking about from December to February?

A. No, sir.

Q. When you returned to work, isn't it correct that you had not?

A. I never spoke with Lt. Muscare about this matter, no, sir.

Q. And it is also correct that you never even saw him during that period of time?

A. That is very true.

Q. I see. Have you had training in masks?

A. Have I had it? Yes, sir, I have.

Q. You have?

A. Yes, sir.

Q. And you have heard the testimony that we have had here this afternoon, haven't you?

83 A. Yes, sir.

Q. About how a man should test his mask to determine whether he has a good seal?

A. Yes, sir.

Q. Well, obviously, you never made any efforts to check whether the face hair that Muscare had affected his seal on a mask or did not?

A. Me personally? No, sir, I did not.

Q. You did not. In fact, no one did, aren't you aware of that?

A. I feel that the only one that could check that would be Lt. Muscare.

Q. Right, he is the only one. And aren't you concerned—

A. I might add, if he made a mistake, it could be fatal.

Q. Yes. To him.

A. And to people that may be depending upon him.

Q. Aren't you concerned that men under your supervision look neat and appear neat?

A. Yes, sir, I am. All commanders are.

Q. And you are concerned that there is an element of discipline in your organization, isn't there?

A. Yes, sir, we are paramilitary.

Q. Well, by that I suppose you mean you expect people to carry out orders?

84 A. Yes, sir, we do.

Q. And one of the orders is not to have eccentric moustaches or other facial hair, isn't that correct?

A. That is true.

Q. And isn't that why Mr. Muscare or Lt. Muscare was suspended, for violation of those rules?

A. Yes, sir.

Q. It had nothing to do with the face piece mask, did it?

A. No, sir, I disagree with that statement.

Q. Well, you never saw him with the face mask, did you?

A. The basic premise of the clean-shaven order is safety, not appearance.

Q. You mean that one should not have an eccentric moustache has to deal with safety, is that what you are saying?

A. Yes, sir, it interferes with the operation of air gear, that is safety.

Q. Do you know what an eccentric moustache is?

A. Not really, no, I don't.

Q. Do you think anybody in your Department knows what an eccentric moustache is, if you don't?

A. Well, I believe that the order not only says "eccentric", but it defines the limits of the moustache.

Q. No, I am not speaking of the order, I am speaking of the word "eccentric" that is used in the order;

85 do you know what "eccentric" means?

A. I would say any moustache that exceeds what the definition of the rule book says.

Q. So the word "eccentric", in your view, is unnecessary in the order, isn't that correct?

A. I would say it is, yes, sir, in English usage, yes.

Q. I can't hear your answer.

A. I would say in English usage, in this particular point, perhaps it is superfluous, yes.

Q. It's what? I'm sorry.

A. Superfluous.

Q. Superfluous. Who drafted that appearance order, if you know?

A. A committee of chiefs was formed back in about 1971, I believe, and they were divided into committees—I couldn't tell you the composition of the particular committee that handled that particular item, but it was forwarded to the then chief fire marshal, Chief Fokamer, who approved it and entered it into the composition of the present rule book.

Q. Were you on that committee?

A. No, sir, I was not.

Q. So you have no direct knowledge as to the basis upon which that order was formulated?

A. No, sir, I do not. I believe though in many con-

86 versations with Chief Fokamer—

Q. Well, I haven't asked you that.

A. I'm sorry.

Q. When you say you are a paramilitary organization, I think you said you expect discipline from firefighters and subordinates; and isn't it a fact that the rules of neatness also relate to discipline, proper discipline in your organization?

A. I don't exactly follow your base thinking. If you mean that neatness automatically gives discipline, I

wouldn't agree with that. Is this the point you are making?

Q. I am just trying to ask the question.

A. Well, it's not clear to me, I wish you would—

Q. But you do require neat appearance in more ways than just facial hair, don't you?

A. Yes. We are a uniformed force.

Q. Yes. And aren't there roll calls taken regularly?

A. Yes, sir, right, this is prescribed.

Q. And men are inspected to examine whether their uniforms are properly cleaned and pressed and according to regulations, is that correct?

A. Yes, sir.

Q. And whether they personally meet cleanliness standards, face and hands, isn't that correct?

A. Yes, sir.

87 Q. Doesn't that deal with discipline?

A. I would say the following of orders is discipline, but personal appearance—I think you are trying to inject something that basically isn't there. Discipline itself does not come from appearance.

Q. If a man came to inspection with a sloppy uniform or unpressed uniform, would he pass inspection?

A. No.

Q. Might he be subject to discipline for it?

A. No, but he might be told to take corrective measures and if he refused to do that then there would be discipline.

Q. Yes. And whether his uniform is clean or not has nothing to do with fighting fires, does it, or with safety?

A. Well, there are many other duties for a fireman besides fighting fires.

Q. Keeping his uniform clean is one?

A. Yes, sir.

Q. And keeping his appearance neat is another?

A. Yes.

Q. Isn't that correct?

A. Yes.

Q. And that is for the purpose of having a well-disciplined force, isn't that right?

A. I would say more for an efficient organization, rather than a well-disciplined force. I don't believe
88 that we are that much on the military side.

Q. So you are kind of a little bit paramilitary, is that what you are saying?

A. Could I explain?

Q. Pardon?

A. Could I explain it?

Q. Well, I don't have the question before you. I think you have explained it.

A. We use the term "paramilitary", because we have levels of rank. It doesn't necessarily stand to follow that our operational orders are of a military nature.

Q. But violation of those orders can subject one to discipline?

A. I am sure that is true of any organization.

Q. Yes. One who has dirty shoes can be disciplined in the Chicago Fire Department, isn't that right?

A. I would think not.

Mr. Sheridan: I object to that. I feel this is irrelevant.

The Court: The answer may stand.

By Mr. Orlove:

Q. Would one pass inspection with unclean shoes?

A. No.

Q. And if he continued to pursue that, after being instructed to clean his shoes, he would be disciplined,
89 wouldn't he?

A. That is a different matter. Now, he is refusing to follow orders. Now, that is a little different than having dirty shoes.

Q. I see. So if one is told to shave off his moustache, he is not following orders if he doesn't, is that correct?

A. No, we don't have an order to shave off a moustache. We have an order to trim it to conform to the section of the rule book that is appropriate.

Q. If one is told to shave off facial hair and he does not, then he is not following orders, is that correct?

A. That is true.

Q. And that is orders in the military sense, to carry out orders, is that right?

Mr. Sheridan: I will object, your Honor. I think any department has right to request a subordinate to do something in accordance with the rules of that department. And if they don't they can be disciplined. It is not necessarily the military sense, it's any sense.

The Court: That is not an objection, it's an argument, Counsel.

Mr. Orlove: More than that.

The Court: The answer may stand. I don't believe it—what was your answer?

90 The Witness: You have got me confused. Restate the question.

The Court: Do you want to repeat it or do you want it read.

Mr. Orlove: I would like to hear as much of it as the witness answered. I know there was an answer there that was cut off.

The Court: My point is, that he has forgotten your question.

Mr. Orlove: I will restate it.

The Court: Thank you.

By Mr. Orlove:

Q. If a firefighter was asked to shave off facial hair and did not do so, that would result in discipline, would it not, in your organization?

A. He would if the facial hair was beyond the extremes as set forth in our rule book, yes.

Q. Well, your rule book says clean-shaven, does it not?

A. Yes, sir.

Q. What if a man had two days growth of beard, is that clean-shaven?

A. No, sir, it is not.

Q. And I assume he would be ordered to shave it off?

A. Yes, sir.

91 Q. And if he did not, he would be subject to discipline, is that correct?

A. Yes, sir.

Q. And the discipline would be for failure to obey an order, isn't that right?

A. True.

Q. So, it is the order that you want obeyed is the purpose behind that regulation, isn't it?

A. Yes, sir.

Q. And you want orders obeyed in a military sense?

A. No, we want orders obeyed because we have a reason to have a man clean-shaven, for safety with air gear.

Q. I'm sorry, I didn't hear you.

A. We have a reason for him to be clean-shaven, and that is safety, safety with air apparatus, air gear, masks.

Q. Are there men in the Fire Department who have administrative positions, who do not actively fight fires?

A. Yes, sir.

Q. Drill Instructor Johnson is one of that kind, is he not?

A. His present assignment is that, yes.

Q. Must he be clean-shaven?

A. Yes, sir. All uniformed members. The book of rules apply to all men in uniform.

Q. It applies to them whether they are in a hazard-
92 ous situation or not—

A. Yes, sir.

Q. —is that right?

A. Yes, sir.

Q. So then it has to do merely with appearance of the individual, doesn't it, not only safety?

A. Firefighter Johnson's tour of duty could end in five minutes and he could be assigned to some other duty.

Q. Then he could have in five minutes, couldn't he?

A. If an emergency would arise tonight, Firefighter Johnson may be pressed into duty somewhere else.

Q. And could shave within that period of time, couldn't he?

A. You would have to ask Firefighter Johnson on that.

Q. Well, we all know the answer.

Aren't there other personnel under—in the employment of the Chicago Fire Department who are administrative personnel who do not actively fight fires?

A. Yes, sir.

Q. And they are required to be clean-shaven, in accordance with your Department rules, whether they are fighting fires or in a hazardous condition or not, aren't they?

A. Do you mean all personnel now?

Q. Yes.

A. No, that is not true. We have exceptions, we
93 have civilian employees, non-uniformed members of the Fire Department.

Q. Are they subject to the Fire Department rules?

A. Not in the book of rules, no.

Q. I didn't hear your answer.

A. They are subject to the direction of the Fire Commissioner, but not the book of rules for uniformed persons.

Q. But aren't there uniformed firefighters who are not actively assigned to a firefighting situation?

A. Yes, sir.

Q. And they are uniformed personnel, aren't they?

A. Yes, sir.

Q. And they are not exposed to any hazard in the line of their duty with the Chicago Fire Department, is that correct?

A. Yes, sir.

Q. But they are required to be clean-shaven at all times, is that correct?

A. Yes, sir.

Q. And there is no jeopardy to their safety or involvement of their safety there, is there?

A. Well, if there is no change of their assignment, which is not—there is no guarantee of that.

Q. Yes. But when they are in their non-hazardous assignment they must comply with the appearance rule?

A. Yes, sir.

94 Mr. Orlove: No further cross.

By Mr. Sheridan:

Q. Chief Foley, when a uniformed member of the Fire Department has an assignment, he can leave the assignment at any time at the direction of his supervisors, is that correct; he can be ordered from one assignment to another assignment at the direction of his supervisors?

A. Yes, sir.

Q. And you indicated that the reason—one of the reasons that the Fire Department requires a person to be cleanly shaven is because of the mask, is that correct?

Mr. Orlove: Objection, because I think I am going to hear a leading question, that is very—in a very critical area, your Honor?

The Court: The objection is sustained. The question was leading.

By Mr. Sheridan:

Q. Chief, calling your attention to Section 51.133 of the Rules and Regulations of the Chicago Fire Department; will you tell me what the Chicago Fire Department—the purposes for that rule the Chicago Fire Department has?

Mr. Orlove: I object. The witness has already testified he was not part of the committee that formulated that rule and he has no knowledge of it, there is no—

95 The Court: He also testified as to the purpose of the rule in response to your questions, I don't think it has to be repeated. The objection is sustained.

Mr. Sheridan: I have no further questions, your Honor.

Mr. Orlove: Nothing further.

The Court: You are excused. Thank you, Chief.

(Witness excused.)

The Court: Does the defense have anything further?

Mr. Sheridan: Nothing further, your Honor.

The Court: Does the petitioner have any rebuttal?

Mr. Orlove: We would, your Honor, but I would like to have a five-minute recess.

The Court: All right. Five minutes. Let's make it five minutes, I would like to finish this tonight.

Mr. Orlove: Yes, your Honor.

(Whereupon, a recess was had, after which the following further proceedings were had herein, to-wit:)

The Court: Counsel?

Mrs. Hirshman: I call Lt. Frank Muscare.

(Witness sworn.)

96 FRANCIS MUSCARE, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mrs. Hirshman.

Q. Please state your name for the record, please?

A. Francis Muscare.

Q. Lt. Muscare, calling your attention to the dates of February 15th to the 21st, 1974; did you say any-

thing with regard to facial hair in the course of your training in the use of the self-contained breathing apparatus?

A. You are talking about at the academy?

Q. Yes.

A. Yes, Instructor Johnson—yes, I did.

Q. What, if anything, did you say?

A. After he got done with his lecture, I asked him if they were the same type of apparatus they used in Boston or New York.

Q. And what was his response?

A. He said he believes so.

Q. Did you say anything further?

A. I asked him how come they weren't concerned with hair?

Q. And what was his response?

A. I believe he said that he didn't know.

97 Q. Thank you. Lt. Muscare, have you ever grown a goatee and a moustache before?

A. Yes, I have.

Q. Has the—were the goatee and the moustache that you grew before essentially the same size and shape and general appearance as the one you have now?

A. Yes.

Q. Has the subject of your goatee and moustache ever arisen with regard to Second Deputy Johnson?

A. I don't understand the question.

Q. Did the subject of your goatee and moustache from the past ever arise with regard to—I believe, it's Second Deputy Johnson?

A. Yes, it did.

Q. And when did this arise? Approximately when did this arise?

A. In the last three years.

Q. And where did this incident arise?

A. Engine 4—

Mr. Sheridan: Your Honor, if I may, I would like to make an objection as to the relevancy of this line of questioning. We are dealing here with the suspension. It was invoked in February, based upon at least, to some degree, to the recommendation of Chief Mor-
98 gan and as based in the complaint, that it was in December of 1973. I think going back before that date is irrelevant to the issues before this Court.

The Court: It may have relevance. Over objection, it may go ahead.

By Mrs. Hirshman:

Q. Who was present at the time that the subject of your goatee and moustache arose with regard to Second Deputy Johnson?

A. Johnson and Chief Mueller, the Third Division Marshal.

Q. What was said at that time?

A. The first time they ordered me to shave it off and I refused.

Q. With respect to Second Deputy Johnson, what, if anything took place, as a result of your continuing to wear your moustache and goatee?

A. At uniform inspection, he refused to inspect me with the goatee on.

Q. With regard to your moustache and goatee from the past did the subject ever arise in connection with Chief Maley?

A. I don't understand the question.

Q. You had a moustache and goatee several times in the past, did the subject of your moustache and goatee ever arise between you and Chief Maley?

A. That would be the same incident.

99 Q. What was said?

A. That I was working under charges at that time.

Q. With regard to the subject of your moustache and goatee, did the question of your choice of wearing a moustache and goatee ever arise with regard to a group of your supervisory officers?

A. The following year I had another one, right, I did.

Q. When did the subject arise with regard to your superiors; approximately when?

A. Well, I was ordered down at 9:00 o'clock in the morning on my off day to go in front of the Board, Chief Fokamer, Chief Brown, Johnson, Dean—I don't remember who the other two were, but there were five or six.

Q. And where did this meeting take place?

A. At the academy.

Q. What was said?

A. Generally?

Q. In the order that it was said. You went down to the academy and what was said?

A. Chief Fokamer did the speaking.

Q. And what did he say?

A. He informed me that—he said he didn't think I knew what discipline was, because of my general attitude about the goatee. And he didn't believe at that

100 time that I had been in the service or I would have understood. And then I told him I was a paratrooper in the service for approximately three years. And he had informed me we weren't there to argue and they could not tolerate me going to work the next day with the goatee.

Q. And what was the result of this?

A. I removed the goatee.

Q. In any of those incidents—in any of the incidents that you have just recounted with Johnson, with Maley, with the group of your superiors, including Chief Fokamer, did anyone ever say anything to you with regard to the self-contained breathing apparatus?

A. No.

Q. Calling your attention to—I have just had this marked as Exhibit No. 1—can you identify that document?

A. This is a general order issued by the Fire Department.

Q. Have you ever seen that order before?

A. Yes, I have. I read it at roll call.

Q. When did you read it at roll call?

A. I would say on or around the day it is issued, maybe a month later.

Q. What does that order say?

A. "Proper Personal Appearance."

(The document was thereupon marked Plaintiff's Exhibit No. 2 for identification, 3/19/74.)

101 Mrs. Hirshman: Your Honor, I would move that the Chicago Fire Department Order No. 685, I believe it is, be entered as Plaintiff's Exhibit 1.

The Court: Any objection?

Mr. Sheridan: Can I see it?

Mrs. Hirshman: Certainly.

Mr. Sheridan: No objection, your Honor.

The Court: It may be admitted.

Mr. Sheridan: Your Honor, I say no objection, I am objecting only in the respect that it is prior to the suspension that we are here considering, your Honor.

The Court: It would have to be or we couldn't suspend anybody on the basis of it, I would assume.

Over objection, it may be admitted.

(The document previously marked Plaintiff's Exhibit No. 1 for identification was received in evidence.)

The Court: This is substantially the same as the regulation that is in issue here, is it not?

Mrs. Hirshman: Yes, your Honor.

By Mrs. Hirshman:

Q. I have just had this document marked Exhibit 2; have you ever seen that document before?

102 A. Yes, I have.

Q. What is it?

A. It's Order No. 685, issued by the Fire Department to, be read at three consecutive roll calls.

Mrs. Hirshman: I move the entry of Plaintiff's Exhibit No. 2, an order of the Chicago Fire Department, dated May of 1970, Order No. 749.

Mr. Sheridan: No objection, your Honor.

The Court: It may be admitted.

(The document previously marked Plaintiff's Exhibit No. 2 for identification, was received in evidence.)

By Mrs. Hirshman:

Q. Lt. Muscare, have you ever had any experience with the array of equipment that we call the self-contained breathing apparatus?

A. I believe we have had them for almost two years, not longer.

Q. Under what conditions have you had experience with the self-contained breathing apparatus?

A. They used them at the John Hancock fire, and I believe in the sub-basement. Two instances that come

up of the—Ambassador East Apartments, I believe it was.

103 Q. So have you used them several times or how many times have you used them in the past?

A. I would say I used them more than several times.

Q. Did you at the time that you were using these masks have the moustache and goatee similar to the one that you have now or the one that you have now?

A. At the John Hancock fire I had the goatee on, right.

Q. Did you have any adverse reaction from attempting to use the self-contained breathing apparatus?

A. None whatsoever.

Q. Have you ever used the self-contained breathing apparatus under non-adverse conditions?

A. We drill with them, right.

Q. Did you have your moustache and goatee while you were drilling with the apparatus?

A. Yes.

Q. Did you have any experiences with any adverse reaction from having the moustache and goatee when you were drilling with the self-contained breathing apparatus?

A. None.

Q. Calling your attention to the training period at—of February, 1974, the mask training at the academy; did you have any kind of training regarding the fitting of your face mask at the academy in February of 1974?

104 A. We were instructed by Firefighter Johnson.

Q. And what kind of instruction did you receive regarding fitting of your face mask?

A. I believe the first morning we had the different parts of the mask, explaining the parts of the mask and their relative duties to the complete operation.

Q. What other kind of training did you receive with regard to masks?

A. I can't remember exactly, but then we hooked up the air bottle, the functions of the bell, and the duration, after it rings, we have in the building, how to put on the face mask and how to test it.

Q. Did you exercise with the self-contained breathing apparatus on?

A. Not at that time.

Q. Did you put the mask on at all?

A. I did the second day in the drill.

Q. You did. And when?

A. I believe every man put the mask on and went up to the fifth floor, walked across the building, when everybody was done I put it on. I wasn't required to walk up and down. And I tested it to see if it would seal on my face.

Q. And what test did you do to see if the mask sealed on your face?

105 A. Put the mask on, slipping it up over your head on your chin first, take the two side straps on the mask, the top one and then the single one on top, put the tube on, put your hand on the bottom of the tube and suck and it should collapse on your face.

Q. And what was the result of your performance?

A. It collapsed on my face.

Q. Lt. Muscare, how long have you been a member of the Chicago Fire Department?

A. Almost twenty years, a little short.

Q. Are you familiar with Section 61.001 of the Rules and Regulations of the Chicago Fire Department,

"Conduct Unbecoming a Member or Employee of the Chicago Fire Department"?

A. Yes, I am familiar with them.

Q. At any time during the twenty years that you were a member of the Chicago Fire Department, has anyone ever told you what constitutes conduct unbecoming an employee or member of the Chicago Fire Department?

A. You mean diagnose it.

Q. Has anyone ever explained to you?

A. No.

Q. Over the course of the years when you had the self-contained breathing apparatus on your truck and were using it to fight fires, did you test it for seal before you used it?

106 A. You test it for seal every time you use it.

Q. And what were the results of your testing your seal on your face mask whenever you used it?

A. It operated.

Q. I beg your pardon?

A. It was sealed properly.

Mrs. Hirshman: Thank you. No further questions.

The Court: Counsel?

(The document was thereupon marked Defendant's Exhibit No. 6 for identification, 3/19/74.)

Cross Examination by Mr. Sheridan.

Q. Lt. Muscare, I would like to show you what has been heretofore marked as Defendant's Exhibit 6 for identification, which purports to be a photocopy of a newspaper excerpt; and I ask you if you have ever seen that before?

A. Not to my knowledge, no, sir.

Q. And Chief Fokamer never told you or no one else ever told you that the breathing apparatus was involved in the rule with respect to the type of hair and moustache and beard you were required to wear?

A. This is the first time it's ever been brought up.

Q. Now, you were informed at the school, by Mr.
107 Johnson, that the Fire Department required you to be clean-shaven in the wearing of the apparatus?

A. I believe I testified to that answer already.

Q. Now, did you indicate that you never interrupted Mr. Johnson when he was giving the lecture, you just spoke to him after the thing?

A. When he was done.

Q. You heard him testify contrary to that, is that correct?

A. Yes.

Q. Now, with respect to the John Hancock, when did that fire take place?

A. I can't hear you, Counsel.

Q. I apologize. With respect to the fire at the John Hancock, can you tell me when that fire took place?

A. Not exactly. Approximately the time of morning—

Q. The day, approximately when?

A. It was on the 95th floor, in the Surrey Restaurant or something.

Q. When, not where?

A. I don't know when.

Q. Last year or two years ago, three years ago?

A. I had the goatee, if that is what you are inquiring about. Commissioner Quinn was present.

108 Mr. Sheridan: I have no further questions of the witness, your Honor.

The Court: Any redirect, Counsel?

Mrs. Hirshman: No.

The Court: You are excused. Thank you, Lieutenant.

(Witness excused.)

The Court: Do you have any further evidence?

Mrs. Hirshman: No further witnesses, your Honor.

Mr. Sheridan: Can I call Chief Foley for a brief moment, your Honor.

The Court: All right. He is here, you may recall him.

Chief Foley?

If this is only going to be one question, why don't you stand right there. Stay right there. What is it. Go ahead and answer.

WILLIAM F. FOLEY, called as a witness in rebuttal on behalf of the defendant, having been previously duly sworn, was examined and testified as follows:

Direct Examination by Mr. Sheridan.

Q. Chief Foley, who was your predecessor in your present position?

A. Curtis W. Fokamer.

109 Q. I would like to show you what has been marked as Defendant's Exhibit No. 6 for identification; and ask you if you have ever seen that document before?

A. Yes, sir, I have.

Q. Now—

The Court: Show it to counsel, if you will, I don't think he knows what it is.

By Mr. Sheridan:

Q. Chief Foley, can you tell me where and when was the first time you saw that document?

Mr. Orlove: Your Honor, I must object to the procedure of showing the witness a copy of what purports to be a newspaper clipping—so we are into the area of hearsay.

The Court: Well, I don't know what its relevance is or where we are going to go with it. If it is a newspaper clipping, it is sort of suspicious that it is hearsay from the outset, but what is your intention, Counsel, what are you attempting to prove?

Mr. Sheridan: Well, I am attempting to prove, your Honor, that the—that his predecessor answer a response to a newspaper regarding the purpose of the rule, in answering—in Action Line, I believe it was—and this is not just something we are concocting for the purposes of this lawsuit.

110 The Court: I can understand that. It's just the question does it purport to be a letter printed in the paper from Curtis Fokamer. Is that what it is?

The Witness: No, sir. It quotes Chief Fokamer in answering a question.

The Court: May I see it then?

Mr. Orlove: Your Honor, of course, the problem is, I can't adequately cross examine the witness to whom these questions are addressed, with respect to the truth of that document.

The Court: I assume you are right, Counsel, it is not subject to cross examination. I will sustain the objection to the admission of No. 6, so there is no point to further inquiry concerning it.

Do you have anything further of this witness?

By Mr. Sheridan:

Q. You reviewed and recommended—you reviewed the charges that were sent in by Chief Morgan, is that correct?

A. Yes, sir.

Q. Now, does the Fire Department have a policy whereby an employee is recommended to be suspended or disciplinary action be taken and reviewed by various personnel and the Commissioner then makes a determination whether or not to suspend someone?

111 A. Yes, sir, we have a regular review procedure.

Q. And were you the one that ordered, I believe, Chief Laddis to go out to the firehouse where Lt. Muscare was present, is that correct?

A. Yes, sir.

Q. That is for the purpose of determining whether or not he still had a beard?

A. Yes, sir.

Q. Was the fact that—it was your belief that facial hair would interfere with the wearing of the gas mask, have anything to do with your suspension, your recommendation?

Mr. Orlove: I am going to object, your Honor, for several reasons.

The Court: The objection is sustained.

Mr. Sheridan: I have no further questions, your Honor.

The Court: Thank you.

Mrs. Hirshman: May I cross examine, your Honor.

The Court: I'm sorry, you may have something. If you will just remain there a moment.

Cross Examination by Mrs. Hirshman.

Q. Chief Foley, are you the gentleman who made the decision about the length of Lt. Muscare's suspension?

112 A. Yes, sir—yes, ma'am, I'm sorry. It's not the first time.

Q. Can you explain to us what the reason was for the twenty-nine days for the length of the suspension?

A. Yes, this is—officially it is up to me, when we get a complaint or a set of charges, we make an investigation as to whether there is some substance to them or not. In this case there seemed to be. The particular person involved had been involved in this argument about hair and about the beard prior to this affair and had complied by shaving it off. Now, it was the second time around. And actually at the time I came back from this sick lay-off, it was really—I had thought when I was laid up that he would comply with this and we could get away with a minimum action, but when I found out that some months later, or a month later that he hadn't complied with it, I felt that he had had his preliminary indoctrination to this thing and that it was now time to take a firm stand, from my point of view.

Q. What is the reason for choosing twenty-nine days for the suspension?

A. Well, we feel—I feel, because it was my action—and I might add here there is one more step, when I make this action, it is reviewed by one more authority, the Fire Commissioner must agree with it, that
113 the lieutenant's actions warranted this in my opinion.

Q. Isn't it a fact that if you suspend a member of the Fire Department with Civil Service status for more than twenty-nine days, that is to say for thirty or more days, he is entitled to certain Civil Service protections before the suspension can be effectuated against him?

A. Well, I feel—I don't know—I don't know that much about Civil Service law. I do know this that a

Civil Service employee is protected at every level as to his right and tenure on the job and so forth.

Q. Do you know that a Civil Service employee cannot be suspended for thirty or more days, without being entitled to a hearing or to interrogation and present evidence and so on?

Mr. Sheridan: Your Honor, I will stipulate to the provisions of 10-1-18 of Chapter 24.

The Court: Is that what they say?

Mrs. Hirshman: Yes.

Mr. Sheridan: They say thirty days or more, your Honor.

Mrs. Hirshman: Thirty days or more is what I said, yes, thirty or more days.

Mr. Sheridan: Over thirty days.

The Court: The next question then, Chief, was whether you were aware of that, that a thirty-day
114 suspension would require a hearing?

The Witness: Yes, sir, this is the maximum time assigned to the case, short of going through the trial court.

By Mr. Hirshman:

Q. I see. Then you are saying, in fact, that this was the maximum suspension you could give this member of the Fire Department, without affording him his Civil Service protections?

Mr. Sheridan: Your Honor, I will object to the form of the question.

The Court: The objection is sustained. I think you made your point, Counsel.

Mrs. Hirshman: Thank you, your Honor.

The Court: You are excused again.

Mr. Sheridan: One question, your Honor, please?

Chief Foley, when someone goes to the Civil Service Commission, at that point the determination of what is to happen to the individual is outside the scope of the Chicago Fire Department, is that correct?

The Witness: Yes, sir.

Mr. Sheridan: He can be discharged and suspended for a longer period than thirty days or found not guilty of the initial charge, is that correct?

The Witness: That is true, yes, sir.

115 Mr. Sheridan: No further questions.

The Court: Thank you, Chief.

(Witness excused.)

The Court: Is there any further evidence?

I assume then that both sides rest?

Mr. Orlove: Yes, your Honor.

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

Name of Presiding Judge, Honorable Frank J. McGarr
Cause No. 74C 656 Date Mar. 19, 1974
Title of Cause—Francis Muscare -vs- Robert J. Quinn, etc.
Brief Statement of Motion—Hearing on preliminary injunction

Cause called for hearing on preliminary injunction. Plaintiff rests on the complaint. Evidence heard for defendant. Defendant rests. Rebuttal evidence heard and concluded. Surrebuttal evidence heard and concluded. Court enters its findings of fact and conclusions of law from the bench. Motion for preliminary injunction is denied. Cause continued to Mar. 26, 1974 at 10:00 A.M. for status report. McGarr, J. March 20, 1974

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

Name of Presiding Judge, Honorable Frank J. McGarr
Cause No. 74C 656 Date 3-26-74
Title of Cause—Muscare v. Quinn
Brief Statement of Motion—To reconsider previous ruling and to rule on remaining issues, together with memorandum
Names and Addresses of moving counsel—Linda Hirshman, 201 N. Wells, Chicago
Representing—Plaintiff

Names and Addresses of other counsel entitled to notice and names of parties they represent—Phil Sheridan, Corporation Counsel, City of Chicago, Defendant

Motion of plaintiff for reconsideration and for amendment of judgment is taken under advisement. Cause continued to Mar. 29, 1974 at 10:00 A.M. for ruling on plaintiff's motion to reconsider previous ruling and further status report. McGarr, J. March 27, 1974

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

MOTION FOR AMENDMENT OF JUDGMENT

(Filed March 26, 1974)

Plaintiff Francis Muscare, by his attorneys Jacobs, Gore, Burns & Sugarman, moves this Court, under Rule 52(b) of the Federal Rules of Civil Procedure, for amendment of its Order Denying Plaintiff's Motion for a Preliminary Injunction. In support of his motion, Plaintiff states as follows:

1. That he has shown that the action by Defendant suspending him from his employment with the Chicago Fire Department for 29 days constitutes irreparable injury to him;

2. That he has shown a substantial likelihood of success on the merits of his claim that Sections 51.133, 61.001 and 61.006 of the Rules and Regulations of the Chicago Fire Department are unconstitutional as applied to him, and

that his suspension violated his constitutional right to due process of law; and

3. That Defendant has failed to prove that Sections 51.133, 61.001 and 61.006 of the Rules and Regulations of the Chicago Fire Department are constitutional as applied to him.

Wherefore, Plaintiff prays that this honorable Court reconsider its ruling denying a Preliminary Injunction against the enforcement of Sections 51.133, 61.001 and 61.006 in his case, and enter a Preliminary Injunction prohibiting the Defendant from continuing to suspend him.

Respectfully Submitted,
/s/ Linda R. Hirshman

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION

(Filed March 26, 1974)

I. *FACTS*

Plaintiff Francis Muscare has been suspended from his position as a Lieutenant with the Chicago Fire Department for alleged violation of §§51.133, 61.001 and 61.006 of the Rules and Regulations of the Chicago Fire Department. At a hearing on Plaintiff's motion for a preliminary injunction Tuesday, March 19, 1974, this Court ruled that Plaintiff's suspension under the provisions of §51.133 did not constitute a violation of his right to determine his personal appearance under the United States Constitution (Transcript, Hearing on Plaintiff's Motion for a Preliminary Injunction, Findings of Fact and Conclusions of Law

at pp.6-7. A copy of the transcript is attached hereto and made a part hereof and is hereinafter referred to as "Tr."). The Court specifically found that while §51.133 of the Rules and Regulations of the Chicago Fire Department might be based in part on constitutionally impermissible motivations (Tr.,pp.5-6), the Rule was still sufficiently related to safety consideration to sustain its constitutionality (Tr.,p.6). Although the uncontroverted testimony at the hearing established that Lt. Muscare had never suffered from any safety problems, particularly with regard to the wearing of a self-contained breathing apparatus, the Court ruled that §51.133 could be applied generally to all members of the Fire Department without an inquiry into its particular applicability to one individual such as Lt. Muscare (Tr.,p.5).

II. *ARGUMENT*

A. *Section 51.133 of the Rules and Regulations of the Chicago Fire Department is Unconstitutional as Applied to Plaintiff in This Case.*

Undisputedly, Lt. Muscare has a constitutional right to determine the details of his personal appearance, including wearing a goatee, and this Court so ruled on that aspect of his case (Tr.,p.3). Defendants have attempted to sustain their interference with this right through testimony that their standards for personal appearance are justified by safety considerations; specifically to insure that each fire fighter obtains an adequate seal on his self-contained breathing apparatus. However, the record of the hearing on Plaintiff's Motion for a preliminary injunction held March 19 demonstrates, uncontrovertably, that Plaintiff experiences no difficulty in using his self-contained breathing apparatus by virtue of his goatee.

At the hearing March 19, witnesses for both Plaintiff and Defendant unanimously agreed that the only effective test of the efficiency of a self-contained breathing apparatus is the test that each man performs himself when he dons the mask. Lt. Muscare testified, without rebuttal, that he has used the self-contained breathing apparatus for many years under fire-fighting conditions and has always obtained a proper seal, even when he was wearing a goatee. Thus, the justification for this across-the-board interference with Plaintiff's constitutional rights is simply the generality that in most cases a rule like §51.133 prohibiting some facial hair may tend to promote the interest of safety.

When ruling in the area of constitutionally protected rights, a governmental agency may not make a rule broader than the minimum necessary to effectuate the governmental interests behind the rule. As the Supreme Court held in *Shelton* v. *Tucker,* 364 U.S. 479 (1960):

> Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in a light of less drastic means for achieving the same basic purpose (364 U.S. at 488).

This requirement that when acting in a constitutionally protected area the government must use the "least drastic means" prohibits the use of general classifications when a case-by-case determination is available to the authorities. The Constitutional weakness of permanent, irrebuttable presumptions is so great that even when fundamental civil rights are not involved, such presumptions are disfavored under the terms of the due process clauses of the Fifth and Fourteenth Amendments to the U. S. Constitution. *Vlandis* v. *Kline,* 412 U.S. 441, 446 (1973).

The administrative convenience of establishing a broad classification is insufficient to justify a general incursion on the constitutional rights of individuals within the class. In the landmark case of *Reed* v. *Reed,* 404 U.S. 71 (1971), the State of Idaho attempted to justify its statutory preference for males to be administrators of estates on the grounds that such a rule served the administrative convenience of the State:

> The [Idaho Supreme Court] also concluded that where such persons are not of the same sex, the elimination of females from consideration 'is neither an illogical nor arbitrary method devised by the legislature to resolve an issue that would otherwise require a hearing as to the relative merits . . . of the two or more petitioning relatives . . .' 401 U.S. 71 at 76.

The Supreme Court rejected this justification, ruling:

> To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the equal protection clause of the Fourteenth Amendment . . . *Id.*

Thus, even where the State can reasonably assert that a legislative regulation accurately applies to most people falling into a classification, when a case-by-case determination is available, the due process clause requires such an individualized determination. *Stanley* v. *Illinois,* 405 U.S. 645 (1972).

There can be no question that such a case-by-case determination is readily available to the Chicago Fire Department for determining whether or not a fireman's personal appearance interferes with the correct usage of his self-contained breathing apparatus. Indeed, as witnesses for both Plaintiff and Defendant agreed at the hearing on March 19, the only way in which the apparatus may be

tested for a correct fit is on a case-by-case basis at the moment of usage by the individual involved. Such a test is not merely available; it is currently in use. Under those circumstances and where, as here, the general rule invades a fundamental constitutional right, such a general regulation is unconstitutional. As the Supreme Court ruled just this year in *Cleveland Board of Education* v. *LaFleur,* 94 S.Ct. 791 (1974):

> While it might be easier for the school boards to conclusively presume that all pregnant women are unfit to teach past the fourth or fifth month or even the first month, of pregnancy, administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law. The Fourteenth Amendment requires the school boards to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty, in support of their legitimate goals. 94 S.Ct. 791 at 799-800.

Section 51.133 of the Rules and Regulations of the Chicago Fire Department is just such an unconstitutional general prohibition. Both sides agree that only Lt. Muscare can ultimately determine whether his face mask seals against his face in a proper manner. He has testified, without rebuttal, that it does so. Thus, as applied to Lt. Muscare, §51.133 is an unconstitutional infringement upon his constitutional right to determine his personal appearance. Further, this general infringement upon his constitutional rights is far more drastic than necessary to insure that each fire fighter is able to use his equipment safely. By suspending Lt. Muscare for failure to conform to §51.133 of the Rules and Regulations, the Chicago Fire Department is infringing upon his constitutional rights, in the absence of any compelling governmental interest in his case, without making the individual determination required by the due process clause of the Fourteenth Amendment.

B. *Section 61.001 of the Rules and Regulations of the Chicago Fire Department is Unconstitutionally Vague.*

1. The Chicago Fire Department has seen fit to suspend Plaintiff for 29 days on the grounds of alleged violation not only of the proper personal appearance regulation, but, in addition, for violation of a rule which prohibits "conduct unbecoming a member or employee of the Chicago Fire Department." §61.001, Rules and Regulations, Chicago Fire Department. Plaintiff has challenged this Section as being unconstitutionally vague. At the hearing of March 19, Plaintiff testified, without rebuttal, that in the twenty years he has spent with the Chicago Fire Department, he has never been apprised of what constitutes "conduct unbecoming a member or employee of the Chicago Fire Department." Such a rule is the very essence of unconstitutional vagueness, and a suspension based even in part on an alleged violation of this rule cannot withstand constitutional scrutiny. See Memorandum in Support of Plaintiff's Motion for a Temporary Restraining Order, § III C.

C. *The Summary Suspension of Plaintiff Violates His Constitutional Rights to Due Process of Law.*

On February 27, 1974, Plaintiff was summarily suspended from pursuing his career as a Chicago fire fighter without the benefit of any procedures comprising basic due process of law. Plaintiff was thus deprived of his property in violation of his constitutional rights. Without notice of the charges against him, without an opportunity to be heard in his own defense, Plaintiff was cut off from his job and his income for actions of which the Fire Department had been aware for at least five months prior to his suspension. At the hearing March 19, Acting Chief Fire Marshall

Foley of the Chicago Fire Department acknowledged that the choice of a twenty-nine day suspension for Plaintiff was determined by the Fire Department's desire to avoid the procedural protections available under State law to a civil servant like Lt. Muscare if he is suspended for thirty days or more. This flagrant violation of Plaintiff's constitutional right to elementary procedural due process prior to being suspended from his job cannot stand. On these grounds alone, Plaintiff is entitled to reinstatement and back pay until such time as his rights are adjudicated by procedures which meet the constitutional standards of due process of law. See Memorandum in Support of Plaintiff's Motion for a Temporary Restraining order, § III D.

III. *CONCLUSION*

Lt. Francis Muscare has been deprived of his constitutionally-protected right to determine his personal appearance under a rule which applies to all fire fighters, regardless of whether or not their appearance interferes with safety. This rule violates Lt. Muscare's right to an individual determination before he can be thus penalized and serves the illegitimate purpose of allowing administrators of the Chicago Fire Department to impose their personal aesthetic preferences upon the members of the Department. For that reason by virtue of the unconstitutional use of a vague rule to supplement the grounds for Lt. Muscare's suspension, and because Lt. Muscare was suspended in violation of his rights to due process, the suspension may not stand.

Respectfully Submitted,

/s/ Linda R. Hirshman

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

EXCERPT

1 Tuesday, March 19, 1974, 2:00 o'clock p.m. Before the Honorable Frank J. McGarr, Judge.

Present:

Mr. Charles Orlove and
Ms. Linda Hirshman,
appeared on behalf of the plaintiff;
Mr. Philip M. Sheridan,
Assistant Corporation Counsel,
appeared on behalf of the defendant.

• • • • •

2 The Court: We are considerably beyond the close of the trial day. Questioning has been broad and in many respects argumentative on both sides. And the areas of argument toward which the questions are directed and are easily inferred. And for this reason I would not require a final argument, which would carry the matter over until tomorrow.

The determination of the application or denial of the application for a preliminary injunction requires that I state certain findings of fact and conclusions of law. Because the matter is simple, I will not require the parties to submit them to me in the form of proposals, but will rather announce findings of fact and conclusions of law now, from the bench, and you may regard my remarks as compliance with the Rule.

Let me first say that I do find that I have jurisdiction in the matter.

And let me note, secondly, the only piece of original research that I have been able to do is the dictionary definition of "goatee", which seems to have

become significant in the case. Webster's Seventh New Collegiate Dictionary—which was the first one at hand—says that a goatee is "a small, trim, pointed or
3 tufted beard on a man's chin." As I speculate on this, it seems to me that it is obvious that a goatee is a beard and that the significance of the word is that it is certain type of a beard, characterized by smallness and, perhaps, by the fact that it is pointed.

I think the decisions make it clear that facial hair is a form of expression protected by the First Amendment.

The evidence makes it clear that the Fire Department regulations prohibit facial hair, except for noneccentric moustaches.

I note that the plaintiff has a small moustache, as evidenced in the photographs attached to his pleadings; and as evidenced by his personal appearance here in court. Which moustache is obviously not eccentric and obviously not a violation of the regulations. And, therefore, obviously not relevant in the case we have here.

The plaintiff also has a rather full goatee or small beard, which is clearly a type of facial hair prohibited by the Fire Department regulations.

The question, therefore, becomes whether the regulations prohibiting the goatee—which is obviously the reason for the suspension, and I so find—whether this
4 regulation is a violation of the plaintiff's rights to First Amendment expression or whether, in fact, it is a reasonable curtailment of his rights for some justifiable and good reason which the Fire Department advances.

The comments I make concerning the goatee in question need not be too detailed for the reason that the plaintiff was good enough to attach to his pleadings

a photograph. And I merely make the finding that the appearance of the plaintiff in the photograph is substantially identical to his appearance here in court today.

The plaintiff's hair and sideburns can, with some slight stretching, be deemed to be in compliance with Fire Department regulations. Which, once again, reaffirms my contention that the only issue is whether the goatee or small beard was the reason for the suspension and whether that suspension was justifiable under the circumstances.

I find that the plaintiff was suspended for twenty-nine days, by virtue of a notice dated February 28, 1974; and that the suspension notice alleges violations of Regulations 61.001, 61.006 and 51.133 of the Fire Department regulations.

The two regulations in the 61 series are general and
5 are not deemed by me, at least, to be relevant or pertinent to the issues here.

Regulation 51.133 focuses on the precise issue, in that it relates to hair. It is titled "Personal Appearance", but relates almost entirely to hair and refers to haircuts, moustache, sideburns and beard.

I find that the plaintiff's facial hair or his goatee violates Regulation 51.133.

There has been evidence as to whether Lt. Muscare's facial hair does or does not interfere with the proper fit and seal of a face mask or for a breathing apparatus.

What we have before us is the validity of a general regulation and its reasonableness generally. And the question of whether it is reasonable in terms of the individual context, which was raised here, I don't think is relevant.

Neither, as we have said before, is the eccentric moustache issue relevant here, inasmuch as I find Lt. Muscare's moustache is not eccentric, and falls within the permissible moustache rules of the Fire Department.

I am not addressing myself in this ruling at all to the issue of whether the Fire Department may have a dress and appearance code, solely for uniformity and
6 the impression made on the public by what has been called a paramilitary organization. I set that issue aside, as one which need not be considered here.

The question here is whether we have a justifiable regulation on the basis of which the Fire Department purports to justify it. The Fire Department justifies it on safety grounds and relates to face mask fit for self-contained breathing apparatus as the basic reason for the regulation. If it is—whether it is the basic reason or not, or whether it is the only reason or not, really I find that if it is a reason, I need not go any further.

After hearing the evidence, examining the exhibits, I find the justification of the Fire Department, that is, the requirement limiting facial hair for reasons of safety related to the fit of the face mask of self-contained breathing apparatus, is neither capricious nor arbitrary justification. It appears to be grounded in reason. And it also appears to involve a minor abridgement of personal liberty, which is justified by safety requirements.

Fortunately, for the Court, I am not required to become an instant expert on self-contained breathing
7 apparatus. I am required only to determine under law whether the defense rationale and justification for this regulation is reasonable. And in the context of safety, I find that it is.

The plaintiff's motion for a preliminary injunction, therefore, is denied.

• • • • •

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Plaintiff's Motion for Amendment of Judgment and Memorandum in Support of Plaintiff's Motion for Reconsideration has this day been served upon the following counsel at the address below by delivering one copy personally:

Mr. Philip Sheridan
Assistant Corporation Counsel
City Hall
Chicago, Illinois

on March 25, 1974.

/s/ Linda R. Hirshman

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

1 TRANSCRIPT OF PROCEEDINGS

(Filed June 24, 1974)

had in the above-entitled cause before the Honorable Frank J. McGarr, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, March 29, 1974, at the hour of 10:00 o'clock a.m. Present:

Messrs. Jacobs, Gore, Burns & Sugarman
(201 North Wells Street, Room 2122,
Chicago, Illinois, 60606), by
Mrs. Linda Hirshman,
appeared on behalf of the plaintiff;
Mr. Richard L. Curry,
Corporation Counsel, City of Chicago

(City Hall, Room 511,
Chicago, Illinois, 60602), by
Mr. Philip M. Sheridan,
Assistant Corporation Counsel,
appeared on behalf of the defendant.

2 The Clerk: 74 C 656, Francis Muscare versus Robert J. Quinn, et cetera, ruling on plaintiff's motion to reconsider previous ruling and for a further status report.

The Court: I have the motion for amendment of judgment filed by the plaintiff in this case, with a memorandum in support of it. And I have reviewed the matter. And it becomes, in effect, a motion for reconsideration of an earlier ruling.

And my ruling at this time is that the motion for reconsideration and the motion for amendment of judgment are both denied.

This leads me to inquire of you, Counsel, where we go from here; what is the next step?

Mrs. Hirshman: Your Honor, you were, in addition, going to rule on the remaining constitutional challenges, which were still open at the last hearing.

The Court: Well, they were implicit, were they not, in your motion for reconsideration?

Mrs. Hirshman: Well, the motion was for reconsideration of the denial of the preliminary injunction. However, there was also a motion for ruling on the remaining issues. Your ruling—if your denial of my motions intends to encompass the other issues—

The Court: I recall your raising this point, but procedurally I really don't know what I can do concerning it. There was a motion for a preliminary—

3 petition for a preliminary injunction. We had a hearing on it and that was denied. Procedurally that is all I can do.

I regard your raising the remaining issues as an additional argument. And to that extent, my ruling, I suppose, is a ruling on those.

But what we have procedurally is a denial of a petition for a preliminary injunction; and that denial has just been reaffirmed. And where you go from there, I don't know. I would assume that you would want to go as fast to the Court of Appeals as you can.

Mrs. Hirshman: The only thing that remains open in my mind, your Honor, is that when you ruled on the preliminary injunction your findings of fact and conclusions of law were directed to one of three arguments which we raised. And before we go to the Court of Appeals—or hopefully not requiring us to go to the Court of Appeals—I would like to ask you, as I thought I had last week, to rule on the remaining challenges.

The Court: Well, in effect, what I am saying is that you asked me to do so. I considered them—I considered them before, you argued them, in a sense, they are in your brief; and the denial of the petition for a preliminary injunction is deemed to be a ruling on all the challenges you raised.

Mrs. Hirshman: Thank you.

The Court: I think you have to so consider it.

Mrs. Hirshman: In that case, since we have no fur-
4 ther evidence to offer, I would ask that you make this a final ruling.

The Court: All right. The order will be that the preliminary injunction heretofore entered is made a final and permanent injunction, which in my mind renders it an appealable order. And see what the Court of Appeals has to say about it.

Mrs. Hirshman: Thank you, your Honor.

Mr. Sheridan: Thank you.

(Which were all the proceedings had in the above-entitled cause this date.)

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

5 CERTIFICATE

I Hereby Certify that the proceedings had in the above-entitled cause before the Honorable Frank J. McGarr, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, March 29, 1974, were reported in shorthand by me; and that the foregoing transcript, consisting of pages 1 to 4, inclusive, is true and correct.

/s/ Anthony W. Lisanti
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

Name of Presiding Judge, Honorable Frank J. McGarr
Cause No. 74 C 656 Date Mar. 29, 1974
Title of Cause—Francis Muscare -vs- Robert J. Quinn, etc.
Brief Statement of Motion—Ruling on plaintiff's motion to reconsider previous ruling and further status report

Plaintiff's motion for reconsideration and motion for amendment of judgment, are both denied. Plaintiff's motion for a preliminary injunction will be considered as a motion for a permanent injunction without further hearing and is denied. McGarr, J. April 1, 1974

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

NOTICE OF APPEAL
(Filed April 26, 1974)

Notice is hereby given that Francis Muscare, Plaintiff, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order denying Plaintiff's motion for a permanent injunction entered in this action on March 29, 1974.

/s/ Linda R. Hirshman
Attorney for Plaintiff
Francis Muscare

April 24, 1974

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

(Letterhead Of)
JACOBS, GORE, BURNS & SUGARMAN
(Filed May 15, 1974)

May 13, 1974
H. Stuart Cunningham
Clerk to United States District Court
for the Northern District of Illinois
United States Court House
219 S. Dearborn
Chicago, Illinois, 60604

re: Francis Muscare v. *Robert J. Quinn etc. (Case No. 74 C 656)*

Dear Mr. Cunningham:
Plaintiff Francis Muscare has filed an appeal from the decision in the above entitled action in which judgment was entered March 29, 1974. Therefore, in accordance with rule 20 of the Rules of the United States Court of Appeals for

the 7th Circuit, Plaintiff requests that you certify and transmit to the Court of Appeals the entire District Court record in case No. 74 C 656. I am enclosing for your convenience a copy of the docket entries in the above entitled action.
A copy of this request has been served upon the attorney for the Defendants, Mr. Philip M. Sheridan, by mailing a copy thereto, properly addressed, to his office.

Very truly yours
/s/ Linda Hirshman
Counsel for Plaintiff-Appellant

Encl/
LH/mol

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

(Letterhead Of)
JACOBS, GORE, BURNS & SUGARMAN

May 25, 1974

Clerk
United States District Court
219 S. Dearborn
Chicago, Illinois.

Re: Muscare v. Quinn
74 C 656

Dear Sir:
I am enclosing copies of Plaintiff's exhibits entered at the hearing on the preliminary and permanent injunction before Judge McGarr. I am unable to locate the original exhibits marked by the Court Reporter, and I request you to accept these exhibits as substitutes. As the transcript of the hearing reveals, Order No. 685 is Plaintiff's Exhibit 1 and Order No. 749 is Plaintiff's Exhibit 2.
If you have any questions, please call.

Very truly yours,
/s/ Linda R. Hirshman

LRH/mol
Encl.

FILED
MAY 2 1974
H. STUART CUNNINGHAM
At _____ o'clock ____
CLERK
DOCKETED

PLAINTIFF'S EXHIBIT 1

Order Number 749

HEADQUARTERS
CHICAGO FIRE DEPARTMENT

May 15, 1970

TO: All Officers and Members
Chicago Fire Department
SUBJECT: Proper Personal Appearance

Gentlemen:

As of this date order #685 is rescinded and superseded by this order.

It has been noted, lately, that some members have adopted hair styles which deviate from the uniform appearance required by the Chicago Fire Department. Therefore, limitations in this respect are hereby imposed as follows:

A. When a mustache is worn it will not extend beyond a line perpendicular to the corners of the mouth. The full upper lip must be readily visible. (See Figure 1.) Extreme styles are not authorized.

B. Bushy, mod, beatle, duck tail, bangs, or block style hair cuts are not authorized. Sideburns will be terminated no lower than on an imaginary line drawn horizontally from the middle of the ear to the corner of the eye. Neck hair will be no lower than one inch above the collar. The hair outline will follow the contour of the ear and slope to the back of the neck. It will be gradually tapered overall, in order to present a neat appearance. (See Figure 2.)

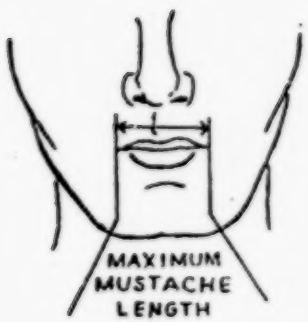

Figure 1

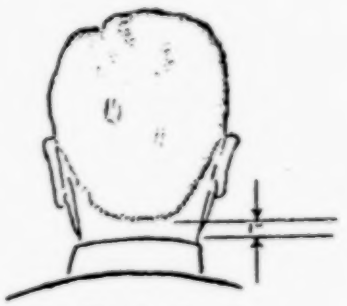

Figure 2

By order of
Curtis W. Volkamer
Chief Fire Marshal

Approved:
Robert J. Quinn
Fire Commissioner

This order is to be read at the next three consecutive roll calls. 19

PLAINTIFF'S EXHIBIT 2

(Filed May 29, 1974)

(Letterhead of)
HEADQUARTERS
CHICAGO FIRE DEPARTMENT

Order No. 685
May 13, 1969

To: Officers and Members
Chicago Fire Department
Subject: Proper personal appearance

Gentlemen:

It has been noted, lately, that some members have adopted hair styles which deviate from the uniform appearance required by the Chicago Fire Department. Therefore, limitations in this respect are hereby imposed as follows:

1. The face shall be clean-shaven, except that a non-eccentric mustache is permissible. The mustache may not extend beyond the width of the mouth.
2. Sideburns shall be trimmed short and shall not come below a point midway between the top and bottom of the ear.
3. Hair shall be worn neatly and closedly trimmed. It shall be clipped at the sides and back so as to present an evenly graduated appearance.

Any question of interpretation of this order may be presented by the individual for clarification and ruling by the Uniform Committee, chaired by 1st Deputy Chief Fire Marshal Raymond Werner [3rd Platoon].

By order of
/s/ Curtis W. Volkamer
Chief Fire Marshal

Approved:
/s/ Robert J. Quinn
Fire Commissioner

This order to be read at the next three consecutive roll calls.

In the

United States Court of Appeals

For the Seventh Circuit

No. 74-1460

FRANCIS MUSCARE,

Plaintiff-Appellant,

v.

ROBERT J. QUINN, individually and as Commissioner, Chicago Fire Dept.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division — No. 74C 656
Frank J. McGarr, *Judge.*

ARGUED JANUARY 16, 1975 — DECIDED MAY 21, 1975

Before CLARK, *Associate Justice**, HASTINGS, *Senior Judge*, and STEVENS, *Circuit Judge.*

PER CURIAM. Appellant-Muscare, a fireman with the Chicago Fire Department since 1955, was suspended from his duties for a 29-day period from February 27 to March 28, 1974, on the ground that his "goatee" violated

* Associate Justice Tom C. Clark, United States Supreme Court (Ret.) is sitting by designation.

the Department's hair regulations.[1] On March 11, 1974, appellant filed a complaint in the United States District Court for the Northern District of Illinois seeking injunctive relief and claiming that his constitutional right to determine his personal appearance had been violated. The district court held a hearing on the matter and denied relief.

On this appeal, Lt. Muscare strenuously argues that this circuit's decision in *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), cert. den., 398 U.S. 937 (1970), compels a recognition of the "right to wear one's hair at any length or in any desired manner [as] an ingredient of personal freedom protected by the United States Constitution," 419 F.2d at 1037, and requires an invalidation of the Department's regulation, absent any showing of "substantial justification" for the restrictions. The Department argues that its regulation can be justified on the basis of: (1) the need to insure the efficient operation of gas masks which must at times be worn by fire-fighters; (2) the need for discipline in a para-military setting; and (3) the need to present a well-groomed and uniform appearance or image to the public. The sufficiency of these various rationales is a

[1] Section 51.133 of the Rules and Regulations of the Chicago Fire Department provides:

> Section 51.133. PROPER PERSONAL APPEARANCE
>
> All members of the Chicago Fire Department shall present a clean and proper appearance in personal care and attire at all times. The face shall be clean-shaven, except that a non-eccentric mustache is permissible. Mustaches shall not extend beyond a line perpendicular to the corner of the mouth and the full upper lip must be readily visible. Sideburns shall be trimmed short and shall be no lower than a line from the middle of the ear.
>
> Hair shall be worn neatly and closely trimmed, and the hair outline shall follow the contour of the ear and slope to the back of the neck. It will be gradually tapered overall in order to present a neat appearance.

matter of considerable dispute in the decided cases;[2] however, we find it unnecessary to resolve that controversy in this case, for appellant was suspended without procedural due process.

It appears that appellant's goatee first came to the attention of his superiors in December 1973, when Lt. Muscare, along with the rest of his company, attended a class at the Chicago Fire Academy, taught by one Leonard Johnson, a drill instructor, to train firefighters in the use of self-contained breathing apparatus. At that time, Instructor Johnson, using instructional materials which had been provided him, informed Lt. Muscare's company that facial hair should not be worn with the

[2] Some courts have upheld hair regulations solely on the basis of "paramilitary" discipline or the need to present a well-groomed image to the public, *see Stradley v. Anderson*, 478 F.2d 188 (8th Cir. 1973) (police); *Yarborough v. City of Jacksonville*, 363 F. Supp. 1176 (M.D. Fla. 1973) (firemen); *Akridge v. Barres*, 122 N. J. Super. 476, 300 A. 2d (1973), aff'd, 65 N.J. 266, 321 A. 2d 230 (1974) (police); *Matter of Greenwald v. Frank*, 70 Misc. 2d 632, aff'd 40 A.D.2d 717 (1972) (police); *cf. Anderson v. Laird*, 437 F.2d 912 (7th Cir. 1971) (National Guard); other courts, however, have rejected this view, *see Dwen v. Barry*, 483 F.2d 1126 (2d Cir. 1973) (police); *Black v. Rizzo*, 360 F. Supp. 648 (E.D.Pa. 1973) (distinguishing between police and firemen). More recently, fire departments across the country have begun to justify hair regulations on the basis of safety considerations, in particular, the efficient use of gas masks. Though fundamentally a fact question, most courts have accepted this theory, *see Michino v. Rizzo*, 379 F. Supp. 837 (E.D.Pa. 1974), aff'd (3d Cir., decided March 24, 1975); *Hordorwich v. Bd. of Police and Fire Comm'rs*, 18 Ill. App.3d 20 (1974); *Manco v. Town of Irvington*, 126 N.J. Super. 148, 313 A.2d 219 (1973), aff'd, 64 N.J. 142, 313 A. 2d 204 (1974); *Olszewski v. Council, Fire Dept.*, 70 Misc. 2d 603 (1972). Only a few courts have found no basis for this justification, *see Lindquist v. City of Coral Gables*, 323 F. Supp. 1161 (S.D. Fla. 1971); *Hunt v. Bd. of Fire Comm'rs*, 68 Misc. 2d 261, 327 N.Y. S. 2d 36 (1971). In passing, we note but without holding that the challenged hair regulation, §51.133, does not appear to be co-extensive with the need for safe and efficient use of gas masks and, if that is the sole justification, might well be more narrowly drawn.

self-contained breathing apparatus, since hair prevented the wearer from obtaining a proper seal on the mask portion of the apparatus. Appellant disputed this, saying: "Boston and New York have men with long hair, beards and mustaches, and they are not concerned about it."

During the course of instruction, each member of the company was expected to don a mask and perform various activities, including walking up five floors of the training tower with the gas mask on, sealed, and functioning. Although it is unclear whether Lt. Muscare, as a senior officer, was required to participate in the training, it is clear that appellant did not put the apparatus on and Johnson had no direct knowledge of whether or not Lt. Muscare could obtain a proper seal. Appellant testified that he successfully tested the mask portion of the apparatus during the training and had never experienced any difficulty obtaining a satisfactory mask seal in the past.

After class, instructor Johnson discussed Muscare's conduct with Chief Prohaska, the drillmaster, and stated that he did not know whether Muscare, while wearing his goatee, could get a good seal on a face mask. Later that month, appellant's superior officer, Chief Morgan, warned him that he would not be permitted to continue working as a firefighter unless he shaved off his beard. A few days thereafter, appellant was informed that charges had been filed against him with the administrative authorities. Nothing more appears to have taken place in regard to this matter for two and one-half months. Then, on the morning of February 27, 1974, three of Lt. Muscare's superiors appeared at his duty station and announced that he was being suspended as of that moment and that he was to turn in his equipment and badge.

On March 4, 1974, the Chief of Personnel sent appellant a letter, informing him that he was being suspended for 29 days for alleged violations of §51.133 (hair regulation), §61.001 ("conduct unbecoming a member or employee of the Chicago Fire Department"), and §61.006 (disobedience of orders). The instant action

followed, attacking not only the constitutionality of the hair regulation, but also the summary suspension procedures employed by the Department.

Appellant urges that due process requires that some opportunity to respond to charges against him be made available to the government employee prior to disciplinary action against him. *See Hostrop v. Board of Junior College District No. 515*, 471 F.2d 488 (7th Cir. 1972), cert. den., 411 U.S. 935 (1973). The Department responds that due process was satisfied since appellant had actual notice of the charges against him and had a statutory right to a post-suspension hearing before the Civil Service Commission, which he failed to exercise. We conclude that post-suspension review is insufficient.

Section 10-1-18 of the Illinois Municipal Code (Ill. Rev. Stat. 1973, ch.24) provides in pertinent part as follows:

§ 10-1-18. *Removal — Suspension — Retirement*

> Except as hereinafter provided in this section, no officer or employee in the classified civil service of any municipality who is appointed under the rules and after examination, may be removed or discharged, or suspended for a period of more than 30 days, except for cause upon written charges and after an opportunity to be heard in his own defense. * * * Nothing in this Division 1 limits the power of any officer to suspend a subordinate for a reasonable period, not exceeding 30 days except that any employee or officer suspended for more than 5 days or suspended within 6 months after a previous suspension shall be entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension.

The Illinois Supreme Court recently had occasion to examine the constitutionality of summary suspension procedures used by the Chicago Police Department and concluded that the demands of due process were met by post-suspension review for suspensions of more than five days and less than 30 days. *Kropel v. Conlisk*, No. 45670 (Ill. S.Ct., decided January 30, 1975). That court, however, did not have the benefit of the United States

Supreme Court's recent decision in *Goss v. Lopez*, 95 S.Ct. 729 (1975). Though *Goss* is a "school" case, it nonetheless points the way to our resolution of the present case.

It can hardly be disputed that appellant, as a twenty-year veteran of the civil service, has a protected property interest in his employment, for "a state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process." 95 S.Ct. at 735. Nor can it be disputed that appellant's suspension for 29 days is not *de minimis*, and the "Court's view has been that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause." 95 S.Ct. at 737. It remains to answer the question what process is due, for in each situation the requirement is a flexible one.

As the Court has stated before and reaffirmed in *Goss*, "many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case," *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950). In the circumstances of America's high schools, the Court thought that notice, an explanation of the evidence the authorities have, and an opportunity to present his side of the story were sufficient to protect the student, and we think that at least this much is required in the circumstances of a public employee's suspension. Not only are alleged transgressions justifying suspension often more serious than school discipline problems, but the

corresponding penalties are potentially more damaging, for reputations, careers, and substantial amounts of lost pay are at stake.[3]

Public employees facing temporary suspension for less than 30 days have interests qualifying for protection under the Due Process Clause, and due process requires at the minimum that they be granted a hearing prior to suspension where they may be fully informed of the reasons for the proposed suspension and where they may challenge their sufficiency. Whether such persons should be granted the full panoply of rights envisioned in Ill. Rev. Stat., Ch. 24, § 10-1-18, for suspensions greater than 30 days is a question which we need not now address, since no hearing of any kind was accorded appellant prior to his suspension.[4]

[3] Here, appellant lost some $1,400 in pay during the 29-day suspension. Such a financial blow can be disastrous to many civil servants. As Judge Skelton noted in *Ricucci v. United States*, 425 F.2d 1252 (Ct.Cl. 1970):

> Few [government employees] earn more than enough to pay their living expenses from month to month, and when their salaries are cut off, they may be in the same destitute circumstances as a welfare recipient whose aid has been discontinued. [425 F.2d at 1257 (concurring opn.).]

[4] The Supreme Court's disposition of *Arnett v. Kennedy*, 416 U.S. 134 (1974), only confirms our analysis of the precise question presented here. There, the Court rejected a due process attack on the discharge of a federal civil servant who had been provided, pursuant to the Lloyd-LaFollette Act, a month's advanced notice of the reasons for his proposed discharge, the materials on which the notice is based, and the opportunity to appear personally before the official having the authority to make or recommend the final decision. Although a three-judge plurality expressed the view that the statute which established the employment property right also established the procedural safeguards to which the employee was entitled, two other Justices concurred in the result solely because they believed that the statute's provision of notice and an opportunity to be heard prior to discharge satisfied the

(Footnote continued on following page)

We do not think that the requirement of presuspension review will result in any unnecessary burden on the administration of public services, nor will it shackle administrators and prevent them from dealing with emergency disciplinary problems, for, as the District of Columbia once pointed out:

> In a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing. [R. A. Holman & Co. v. SEC, 299 F.2d 127, 131 (D. C. Cir.), cert. den., 370 U.S. 911 (1962).]

Here, we perceive no such justification for avoiding the requirement of a pre-suspension hearing. Even if we accept the Department's contention that the rationale behind its hair regulation is safety, a number of steps short of summary suspension are available to the Department pending a hearing on a violation of that regulation. Moreover, there is merit to appellant's comment in his brief that:

> The present case hardly presents an emergency requiring the Fire Department to act without any prior process, where the Fire Department utilized the services of Lt. Muscare for a period of over two months from the time in December of 1973 when he was initially reprimanded for wearing a goatee to the time he was suspended on February 27, 1974.

[4] *Continued*
minimal requirements of constitutional due process. In dissent, four other Justice would have gone further and required additional safeguards such as an impartial hearing examiner, the opportunity to present witnesses, and the right to conduct cross-examination. It can hardly be said, therefore, that *Arnett* stands for the proposition that, by accepting governmental employment, a civil servant is entitled only to such procedures as are provided by statute.

Accordingly, we reverse the judgment of the district court and remand for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES COURT OF APPEALS
• • (Caption No. 74-1460) • •
(Dated May 21, 1975)

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED AND REMANDED, with costs, in accordance with the opinion of this court filed this date.

IN THE UNITED STATES COURT OF APPEALS
• • (Caption No. 74-1460) • •
(Dated June 17, 1975)

ORDER

In the petition for rehearing and suggestions for rehearing *en banc* or, in the alternative, for certification of questions of law to the Supreme Court filed in the above-entitled cause, it is suggested that there is a conflict between our decision and *Brubaker* v. *Board of Education, School District 149, Cook County, Ill.*, 502 F.2d 973 (7th Cir. 1975). We note that in *Brubaker* on rehearing *en banc* this court affirmed the district court judgment by an equally divided vote, 502 F.2d 1000, but failed to reinstate the panel opinion. In addition, *Goss* v. *Lopez*, 419 U.S. 565 (1975), which we decided was controlling in *Muscare*, came down after *Brubaker*.

On consideration of the petition and suggestions, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestions, and

all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be and the same is hereby DENIED.

IN THE UNITED STATES COURT OF APPEALS
• • (Caption No. 74-1460) • •
(Dated June 25, 1975)

On consideration of the motion and affidavit of counsel for the defendant-appellee for a stay of mandate,

IT IS ORDERED that the mandate of this court be, and the same is hereby, STAYED to and including July 24, 1975, pursuant to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

Name of Presiding Judge, Honorable Frank J. McGarr
Cause No. 74C 656 Date Aug. 5, 1975
Title of Cause—Francis Muscare -vs- Robert J. Quinn, etc.

On Court's own motion, order cause set for status report on Sept. 5, 1975 at 10:00A.M. McGarr, J.

IN THE UNITED STATES COURT OF APPEALS
• • (Caption No. 74-1460) • •
(Dated August 11, 1975)

This matter comes before the Court on the motion of defendant-appellee seeking to have this Court recall the mandate in this appeal,

IT IS HEREBY ORDERED that said motion be GRANTED and that the Clerk of this Court be ordered

to recall the mandate in so far as said mandate was issued in contravention of this Court's order of July 31, 1975.

IN THE SUPREME COURT OF THE UNITED STATES

No. 75-130, October Term, 1975

Robert J. Quinn, individually and as Commissioner, Chicago Fire Department,

Petitioner,

vs.

Tom C. Clark, Justice, et al.,

Respondents.

ORDER ALLOWING CERTIORARI
(Filed October 14, 1975)

The motion for leave to file a petition for a writ of mandamus is denied. The alternative petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (No. 74-1460) is granted. The case is recaptioned in this Court as: *Robert J. Quinn, individually, and as Commissioner, Chicago Fire Department, petitioner,* v. *Francis Muscare,* to reflect the true respondent in this case.

IN THE UNITED STATES DISTRICT COURT

• • (Caption No. 74 C 656) • •

Name of Presiding Judge, Honorable Frank J. McGarr
Cause No. 74C 656 Date Nov. 18, 1975
Title of Cause—Francis Muscare -vs- Robert J. Quinn, etc.
Brief Statement of Motion—Motion for entry of order granting defendants and printer leave to withdraw record for purpose of having it reproduced for the Supreme Court of U.S.
Names and Addresses of moving counsel—William R. Quinlan, Corporation Counsel of City of Chicago, 511 City Hall, 121 N. LaSalle, Chicago, Edmund Hatfield, Asst. Corp. Counsel
Representing—Robt. J. Quinn, etc.
Names and Addresses of other counsel entitled to notice and names of parties they represent—Linda R. Hirshman, Jacobs, Gore, Burns and Sugarman, 201 N. Wells, Suite 2122, Chicago, Ill.

Enter order granting defendant leave to withdraw the record on appeal from the Clerk in order to prepare Appendix for review by the Supreme Court of the United States. (draft) McGarr, J.

Respectfully submitted,

WILLIAM R. QUINLAN
Corporation Counsel of the City of Chicago
511 City Hall, Chicago, Illinois 60602
Attorney for Petitioner

DANIEL PASCALE
EDMUND HATFIELD
Assistant Corporation Counsel
Of Counsel

Supreme Court, U. S.
FILED
AUG 22 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-130

ROBERT J. QUINN, INDIVIDUALLY AND AS COMMISSIONER OF THE CHICAGO FIRE DEPARTMENT,
Petitioner,

vs.

TOM C. CLARK, JUSTICE; JOHN F. HASTINGS, CIRCUIT JUDGE; JOHN PAUL STEVENS, CIRCUIT JUDGE; FRANK J. McGARR, DISTRICT JUDGE, AND FRANCIS MUSCARE,
Respondents.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS, PETITION FOR A WRIT OF MANDAMUS, AND IN THE ALTERNATIVE, PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

LINDA R. HIRSHMAN,
Attorney for Respondents.

Of Counsel:
JACOBS, GORE, BURNS
& SUGARMAN,
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Chicago, Illinois 60606,
Telephone: [312] 372-1646.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No.

ROBERT J. QUINN, INDIVIDUALLY AND AS COMMISSIONER OF THE CHICAGO FIRE DEPARTMENT,
Petitioner,

vs.

TOM C. CLARK, JUSTICE; JOHN F. HASTINGS, CIRCUIT JUDGE; JOHN PAUL STEVENS, CIRCUIT JUDGE; FRANK J. McGARR, DISTRICT JUDGE, AND FRANCIS MUSCARE,
Respondents.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS, PETITION FOR A WRIT OF MANDAMUS, AND IN THE ALTERNATIVE, PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Respondents oppose the issuance of leave to file a Petition for a Writ of Mandamus and the issuance of such Writ commanding the United States Court of Appeals for the Seventh Circuit to vacate the judgment entered by it in this case on May 21, 1975. Respondents also oppose the issuance of a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on the same day.

QUESTIONS PRESENTED.

Whether a single judge District Court has jurisdiction to enjoin the Fire Department of the City of Chicago from suspending a permanent civil servant by means of summary procedures which violate his right to due process of law.

Whether a permanent civil servant may be summarily suspended from his job for twenty-nine days without pay absent any notice of the charges against him, opportunity for any hearing or opportunity to challenge those charges prior to the adverse action.

Whether this Court has jurisdiction to review one aspect of the decision of the District Court, when the District Court was reversed and remanded by the Court of Appeals on other grounds.

STATEMENT OF THE CASE.

On February 27, 1974, three administrators of the Chicago Fire Department entered the duty station where Respondent Lt. Francis Muscare, a permanent civil servant of twenty years seniority, was working as a firefighter, and ordered him from the job and the premises pursuant to a suspension levied against him as of that moment (R. 1, p. 2). Five days later, Lt. Muscare received a letter from Walter R. Braun, Chief of Personnel, informing him for the first time that he was being suspended for twenty-nine days for alleged violation of three provisions of the Rules and Regulations of the Chicago Fire Department (R. 1, Exh. "C"). By the letter from Braun, Lt. Muscare learned that he was charged with (1) disobedience of orders (Rules and Regulations of the Chicago Fire Department, § 61.006), (2) conduct unbecoming a member of the Chicago Fire Department (Rules and Regulations of the Chicago Fire Department, § 61.001) and (3) improper personal appearance (Rules and Regulations of the Chicago Fire Department, § 51.133) (R. 1, Exhs. "D," "E" and "F").

Immediately thereafter, Lt. Muscare filed this action in the United States District Court seeking a Temporary Restraining Order[1] restraining the continued imposition of this suspension against him on the grounds that: (1) his suspension violated his constitutional right to determine his own individual appearance; (2) that § 61.001 of the Rules and Regulations ("conduct unbecoming") is unconstitutionally vague, and (3) that the summary procedures by which the Petitioner suspended him from his job for twenty-nine days violated his constitutional rights to due process of law (R. 1 and 4).

Lt. Muscare set forth these three contentions in his initial Complaint and pursued them consistently throughout the litigation (R. 1). After the District Court denied his Petition for a Temporary Restraining Order, Lt. Muscare proceeded to a trial on his request for preliminary injunction, declaratory relief and damages. At trial, pursuant to his Complaint, Lt. Muscare presented his evidence supporting his challenge to the constitutionality of the Fire Department's suspension procedures (R. 17, pp. 77-82; 111-115). However, District Court Judge McGarr denied Lt. Muscare's requested relief, ruling solely on the grounds of the constitutionality of the personal appearance regulation (R. 15). Thereafter, Lt. Muscare specifically moved the District Court for reconsideration, to request a ruling on his separate and independent claims that the Rules and Regulations were unconstitutionally vague and that the procedures by which he was suspended constituted a violation of his rights to due process (R. 13, p. 7; Respondents' App. "A", pp. 2-3).[2] On appeal from the District Court's continued refusal to acknowledge the validity of his constitutional claims, Lt. Muscare raised to the United States Court of Appeals for the Seventh

1. Lt. Muscare also asked for declaratory judgment, damages and other relief.

2. Respondent is thus utterly unable to ascertain the basis for Petitioner's contentions that Muscare did not raise this issue at the inception of this litigation and consistently thereafter (Pet. Br., pp. 15, 18).

Circuit all three challenges to the action taken against him. Pursuant to Lt. Muscare's appeal, that Court ruled that Petitioner's procedures summarily suspending him without notice of the charges brought against him or opportunity for any hearing to respond to the accusations constituted an illegal deprivation of his property without due process of law (App. B, p. 11a).

Rejecting Petitioner's contention that the constitutional requirement of due process was satisfied by a hearing after the imposition of the suspension, the Court concluded simply:

> ". . . post-suspension review provided by State law, [Ill. Rev. Stat. ch. 24, § 10-1-18] is insufficient." (App. B, p. 9a.)

In thus rejecting Petitioner's contention that the procedures already available under Illinois law satisfied the requirements of due process, the Court of Appeals was not called upon to and did not pass on the constitutionality of that law itself. The Seventh Circuit held only that Petitioner's failure to provide any prior due process in the instant case violated Muscare's constitutional rights and that the separate procedures provided by State law for a review following the adverse action did not remedy the violation inherent in the Petitioner's procedures preceding the suspension (App. B, p. 11a).

ARGUMENT.

REASONS FOR DENYING THE WRIT OF MANDAMUS.

1. The District Court Had Jurisdiction Over This Challenge to the Constitutionality of the Procedures of the Chicago Fire Department.

From filing his Complaint through his appeal to the Seventh Circuit, in this action Lt. Muscare has consistently challenged the failure of the Chicago Fire Department to provide constitutionally acceptable procedures prior to his suspension.[3] By contrast, Lt. Muscare has never challenged the constitutionality of the Illinois law which provides a measure of protection for municipal civil servants in the form of a later review of adverse action (*Ill. Rev. Stat.*, ch. 24, § 10-1-18). Only Petitioner has attempted unsuccessfully to inject the issue of the Illinois statute into these proceedings, and Petitioners' present tardy attempt to question the District Court's jurisdiction by characterizing this action as an injunction against enforcement of Ch. 24, § 10-1-18 is equally without foundation. The Seventh Circuit ordered no such action, nor is such action required in this case. Ch. 24, § 10-1-18 provides:

> "Except as hereinafter provided in this section, no officer or employee in the classified civil service of any municipality who is appointed under the rules and after examination, may be removed or discharged, or suspended for a period of more than 30 days, except for cause upon written charges and after an opportunity to be heard in his own defense. . . . Nothing in this Division 1 limits the power of any officer to suspend a subordinate for a reasonable period, not exceeding 30 days except that any employee or officer suspended for more than 5 days or suspended within 6 months after a previous suspension shall be entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension. . . ."

3. In his brief, Petitioner represents that a three judge court "was not required" when Lt. Muscare requested an injunction initially since "the injunction sought was only against enforcement of a local regulation by Defendant, a local official." (Pet. Br., p. 18). To the contrary, from the outset, Lt. Muscare's entire cause of action has been clearly set forth in his Complaint, detailing his challenge to the constitutionality of the procedures by which he was suspended. Even a cursory glance at the transcript of the proceedings before District Judge McGarr reveals that, indeed, at the hearing on a preliminary injunction Lt. Muscare specifically relied on his sworn Complaint detailing the summary manner in which he was separated from his employment, and that counsel for Lt. Muscare directed cross-examination of the Petitioner's witnesses to demonstrate that Petitioner wilfully attempted to place his action outside the restrictions of the state statute by selecting the twenty-nine day figure for the suspension (R. 17, pp. 111-114). If no three-judge court was required at the inception of this case as Petitioner here concedes, a three-judge court was never required, as this case did not change one iota from the filing of the Complaint to the filing of this Petition for Mandamus and Certiorari.

Thus, on its face, § 10-1-18 specifically excludes from coverage the pre-suspension treatment of municipal servants by their officers for suspensions of under thirty days. Under the terms of § 10-1-18, Petitioner was free to provide or fail to provide whatever procedures he chose prior to the imposition of discipline for less than thirty days. Accordingly, without violating the provisions of § 10-1-18, the Petitioner and his agents, the officers and administrators of the Chicago Fire Department, were able to engage in the summary practices employed against Lt. Muscare in this action. By suspending Lt. Muscare for a period of twenty-nine days, the Chicago Fire Department put its action beyond the restrictions of § 10-1-18 and freed itself to discipline Lt. Muscare merely by the unheralded appearance of three of his superior officers in his fire station. Respondent never contended and no Court has ever ruled that procedures for post-suspension review are unconstitutional or should be enjoined. The ruling of the Seventh Circuit in this action applies to Petitioner, a local official, in an area where the State has not acted—the pre-discipline procedures for disciplinary actions of fewer than thirty days.[4] Petitioner cannot now recast this litigation as an attack on a statute whose relevance to Lt. Muscare's cause of action exists only in Petitioner's mind.

Even assuming *arguendo* that § 10-1-18 has any application to this action, at most Illinois law may permissively allow city officials to undertake the unconstitutional procedures which the Seventh Circuit struck down. § 10-10-18 provides:

4. The Seventh Circuit specifically distinguished between the suspension under thirty days and the application of *Ill. Rev. Stat.*, Ch. 24, § 10-1-18 for suspensions beyond thirty days:

> Public employees facing temporary suspensions for less than thirty days have interests qualifying for protection under the due process clause . . . whether such persons should be granted the full panoply of rights envisioned in *Ill. Rev. Stat.*, ch. 24, § 10-1-18 *for suspensions greater than thirty days* is a question which we need not now address, since no hearing of any kind was accorded appellant prior to his suspension. (App. B, p. 11a) [emphasis added].

> "Nothing in this Division 1 limits the power of any officer to suspend a subordinate for a reasonable period, not exceeding 30 days except that any employee or officer suspended for more than 5 days or suspended within 6 months after a previous suspension shall be entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension. . . ."

However, under § 10-1-18, the unconstitutional acts in this case are still the acts of a local authority—the City of Chicago Fire Department. It is well-settled law that a three-judge court is not required where the questionable action authorized by the State legislature is of only local import. *Moody* v. *Flowers*, 387 U.S. 97, 87 S.Ct. 1544, 18 L.Ed.2d 643 (1967); *Dusch* v. *Davis*, 387 U.S. 112, 87 S.Ct. 1554, 18 L.Ed.2d 656 (1967); *Board of Regents of University of Texas System* v. *New Left Education Project*, 404 U.S. 541, 92 S.Ct. 652, 30 L.Ed.2d 697 (1972); *McCrimmon* v. *Dailey*, 418 F.2d 366 (7th Cir. 1969).

In *McCrimmon, supra*, the Seventh Circuit was confronted with a challenge to the validity of a Chicago City Ordinance making it unlawful for the holder of a liquor license to:

> *"engage, employ or permit the engagement or employment of any female person other than the licensee or the mother, daughter, wife or sister of the licensee to draw, pour or mix any alcoholic liquor, . . ."* (418 F.2d at 371).

The only state statute involved was a state enabling act providing:

> "In every city, village or incorporated town, the city council or president and board of trustees, and in counties in respect of territory outside the limits of any such city, village or incorporated town the county board shall have the power by general ordinance or resolution to . . . *prohibit any woman or minor, other than a licensee or the wife of a licensee, from drawing, pouring, or mixing any alcoholic liquor as an employee of any retail licensee.*" (418 F.2d at 371-2).

Even when confronted with this state legislation specifically setting out almost the exact language of the very ordinance whose constitutionality was challenged, the Seventh Circuit ruled that "the State statute concerned is merely permissive enabling legislation pursuant to which the critical City ordinance was enacted and enforced . . . There remains for consideration only a local city ordinance enforced by local officials. Clearly the requirements of 28 U.S.C.A. § 2281 are not satisfied here." 418 F.2d at 368-9. If a three-judge court was not required to hear the constitutional challenge in *McCrimmon*, this case is *a fortiori*. Unlike the State law in *McCrimmon*, nothing in § 10-1-18 affirmatively detailed Petitioner's right to suspend Lieutenant Muscare without any semblance of due process. Under § 10-1-18, unless the suspension is for more than thirty days, the Department is simply free to follow its own predilections in establishing procedures, as it has done in this case. These procedures were unconstitutional; the Seventh Circuit found them to be so; and the provisions of § 10-1-18 remain untouched.

Similarly, in *Dusch* v. *Davis, supra*, the court was confronted with a state statute authorizing the enactment by local authorities of a consolidation plan of borough government. Nonetheless, this court ruled that the consolidation plan for Princess Anne County, Virginia, enacted under authority of state law, was local only and not of state-wide application, and a challenge to the validity of the plan did not require convening of a three-judge court. Therefore, even assuming *arguendo* that § 10-1-18 may be construed to represent an opportunity for the Fire Department to pursue its unconstitutional procedures, this challenge to those procedures does not mandate a three-judge court, in direct contravention to the "oft repeated admonition that the three-judge court statute is to be strictly construed" (*Board of Regents, supra*, 92 S.Ct. at 655; *Allen* v. *State Board of Elections*, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969)).

By contrast, in *Sailors* v. *Board of Education of County of Kent*, 387 U.S. 105, 87 S.Ct. 1549, 18 L.Ed.2d 650 (1967),

on which Petitioner relies, a state statute of state-wide application mandated that County School Boards in the State were to be selected by delegates from local school boards. In order to challenge the composition of any county school board, Plaintiffs were forced to and did challenge the constitutionality of the state statute and invoke a three-judge court.[5] However, unlike the law in *Sailors*, the provisions of Chapter 24, § 10-1-18 providing for post-suspension review co-exist without conflict with a proper, constitutional, pre-suspension procedure. In order to attack the absence of pre-suspension procedures, Plaintiff need not and Plaintiff did not attack the constitutional validity of Chapter § 10-1-18 within its limited sphere.

Thus, in this action, the District Court possessed full jurisdiction to hear and the Seventh Circuit to review this challenge to the constitutionality of the procedures of the Chicago Fire Department, and Petitioner's request for a Writ of Mandamus is without merit and should be denied. For the same reasons, Petitioner's request for a Writ of Certiorari on these grounds should also be denied.

REASONS FOR DENYING THE WRIT OF CERTIORARI.

1. The Decision of the Seventh Circuit Is in Full Accord with the Applicable Decisions of This Court.

As the Seventh Circuit specifically noted in its opinion, in reaching its decision in the instant case, it enjoyed the "benefit of the United States Supreme Court's recent decision in *Goss* v. *Lopez*, 95 S.Ct. 729 (1975)" (App.B, pp. 9a-10a). In *Goss*, this Court ruled that before suspending a student from a public

5. Similarly, in *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89, 55 S. Ct. 678, 79 L.Ed. 1322 (1935) cited by Petitioner, the Plaintiff unsuccessfully attempted to enjoin a criminal prosecution under New York State law which made it a state-wide misdemeanor to violate any provision of the Federal National Industry Recovery Act, 15 U. S. C. A. § 1701, *et seq.* Again, the Supreme Court specifically found that "the statute under attack attempted to establish a state-wide policy." (295 U. S. at 95).

school, the authorities must provide him with notice, an explanation of the evidence the authorities have, and an opportunity to present his side in order to protect the student from summary disciplinary action in violation of his rights to due process of law. In the instant case, involving the summary discipline of a permanent public employee, the Seventh Circuit concluded, "We think at least this much is required in the circumstances of a public employee's suspension" (App. B, p. 10a). As the Seventh Circuit ruled, after this Court's holding in *Goss, supra,* their decision in the case at hand was *a fortiori:*

> "Not only are alleged transgressions justifying suspension often more serious than school discipline problems, but the corresponding penalties are potentially more damaging, for reputations, careers, and substantial amounts of lost pay are at stake." (App.8, pp. 10a-11a).

Petitioner, however, contends that the decision in *Muscare* conflicts with the *Goss* holding, alleging that *Goss* "actually stands for the proposition that a public school student cannot be suspended or expelled unless he is granted a hearing either before or promptly after suspension or expulsion" (Pet. Br. p. 29). Directly contrary to Petitioner's representations, this Court ruled specifically in *Goss* that "as a general rule, notice and hearing should *precede* removal of the student from the school" (95 S.Ct. at 740) [emphasis added]. Further, this Court rejected the state's contention in *Goss,* almost identical to the Petitioner's argument here, that the constitutional requirements of due process were satisfied by a provision for post suspension judicial review, ruling that:

> "without a demonstration to the contrary, we must assume that delay will attend any § 2501.06 proceeding, that the suspension will not be stayed pending hearing, and that the student meanwhile will irreparably lose his educational benefits." (95 S.Ct. at 740.)

Nothing in *Goss* authorizes a delay of hearing until after the imposition of discipline except a specific circumstance of imminent danger or disruption.[6] Petitioner's attempt to distinguish

6. The Seventh Circuit specifically dealt with the issue of imminent danger or disruption in its opinion in *Muscare* ruling that:

> "Even if we accept the Department's contention that the rationale behind its hair regulation is safety, a number of steps short of summary suspension are available to the Department pending a hearing on a violation of that regulation. Moreover, there is merit to appellant's comment in his brief that:
>
> > The present case hardly presents an emergency requiring the Fire Department to act without any prior process, where the Fire Department utilized the services of Lt. Muscare for a period of over two months from the time in December of 1973 when he was initially reprimanded for wearing a goatee to the time he was suspended on February 27, 1974." (App. B, p. 12a).

the opinion of the Seventh Circuit in *Muscare* from *Goss* by thus misrepresenting this Court's opinion in *Goss* is without any foundation and must fail.

Similarly, as the Seventh Circuit noted, its decision in the instant case is confirmed by an examination of this Court's disposition of *Arnett* v. *Kennedy,* 416 U.S. 134, 94 S.Ct. 1633 ..... L.Ed.2d ..... (1974) (App.B., pp. 11a-12a, n.4). In that case, the plaintiff, a permanent federal civil servant had been accorded elaborate pre-discipline procedures including notice and an opportunity to be heard prior to his discharge. Contrary to Petitioner's representation in its brief, a majority of five justices did not find "due process to be satisfied" (Pet. Br., p. 26) by administrative procedures providing only for post-removal hearing. By thus characterizing this Court's decision in *Arnett,* Petitioner simply ignores the availability of elaborate pre-removal due process to the Plaintiff in that case. In *Arnett,* two of the five justices comprising the majority for the reversal of the District Court, specifically noted that:

> ". . . the affected employee is provided with 30 days advance written notice of the reasons for his proposed discharge and the material on which his notice is based. He is accorded the right to respond to the charges both orally and in writing, including the submission of affidavits. Upon request, he is entitled to appear personally before the official having the authority to make or recommend the final decision. Although an evidentiary hearing is not held, the employee may make any representations he believes relevant to this case." Op. of Powell, *J.*, joined by Blackmun, *J.*, concurring (94 S.Ct. at 1652).

Far from holding, as Petitioner represents, that the due process requirements were satisfied by statutory provisions for post-removal hearings, the two concurring Justices specifically relied on the existence of elaborate pre-removal protection in coming to their conclusions, that the "present statute and regulations comport with due process by providing a reasonable accommodation of the competing interests" (94 S.Ct. at 1652).

Similarly, a sixth member of the Court, Mr. Justice White, also relied on the existence of elaborate pre-discipline protections in finding that the statutory and regulatory provisions governing the discharge might meet constitutional requirements:

> "The statute's provisions *to the extent that they require 30 days advance notice and the right to make a written presentation* satisfy minimum constitutional requirements." (94 S.Ct. at 1664-5) [emphasis added].

Mr. Justice White demonstrated just how seriously he regarded the requirement of a fair pre-termination hearing for a public civil servant "before his wages are provisionally cut off" (94 S.Ct. at 1665) by dissenting from the result reached by the majority of the Court affirming Kennedy's discharge, because the person receiving evidence at the preliminary pre-termination hearing in *Arnett* was not a neutral individual. Thus, directly contrary to Petitioner's mis-representation that Justice White believed "it is sufficient if there is some kind of hearing at some time" (Pet Br., p. 28), Justice White dissented from the affirmance of the discharge in *Arnett* despite the existence of post-discharge review, because the prior hearing did not meet constitutional standards for a fair procedure.

Finally, three justices dissented completely from the Court's opinion in *Arnett*, holding:

> "I would affirm the judgment of the District Court, both in its holding that a tenured government employee must be afforded an evidentiary hearing prior to a dismissal for cause and in its decision that 5 U. S. C. § 7501 is unconstitutionally vague and overbroad as a regulation of employees' speech." (94 S.Ct. at 1670).

Thus, as six of the nine Justices in *Arnett* agreed, it is now well established that where, as here, the interest involved is the employment of a permanent, tenured, civil servant, elementary considerations of due process entitle him to an opportunity to hear the charges against him and present his responses prior to his separation from the property interest at stake. *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972); *Goss* v. *Lopez, supra; Perry* v. *Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972); *Arnett* v. *Kennedy, supra.* Speaking to the very issue of the timing of procedural due process in *Roth, supra,* this Court acknowledged that "when protected interests are implicated, the right to some kind of *prior* hearing is paramount" (408 U.S. 511 at 569-570). Citing *Boddie* v. *Connecticut,*[7] the Court continued, *"Before* a person is deprived of a protected interest, he must be afforded opportunity for some kind of hearing." *Id.* [emphasis added]. In sum, the decision of the Seventh Circuit mandating some pre-suspension procedures in this case accords completely with the recent decisions of this Court.

The decision of the Seventh Circuit in *Muscare* is also in accord with the decisions on this issue in the other federal courts.[8] *Skehan* v. *Board of Trustees of Bloomsburg State Col-*

7. 401 U.S. 377, 91 S.Ct. 780, 28 L.Ed. 2d 113. In *Boddie supra,* this Court ruled that under the due process clause, a state could not constitutionally deny access to its courts to persons seeking a hearing for a divorce. Defining some parameters of the due process clause, this Court noted:

> That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest. (401 U. S. at 378-379) [emphasis in original].

8. As the Seventh Circuit noted in their opinion in *Muscare,* their holding that due process requires a pre-discipline procedure also accords with their own decision that even a college president may not be discharged until *after* a hearing. *Hostrop* v. *Board of Junior College No. 515, Etc., Ill.,* 471 F.2d 488, 494 (7th Cir. 1972), cert. den., 411 U. S. 935 (1973).

lege, 501 F.2d 31 (3rd Cir. 1974), vacated and remanded on other grounds, 95 S.Ct. 1986 (1975);[9] *Snead* v. *Department of Social Services, City of New York*, 355 F. Supp. 764 (S. D. N. Y. 1973), vacated and remanded for reconsideration on the grounds of mootness, 43 U. S. L. W. 3622 (1975). In *Skehan, supra*, the defendant college discharged a teacher several months prior to the expiration of his contract without any prior opportunity for an actual hearing. Despite the actions of the school administration before the discharge appraising the teacher in writing of his alleged transgressions and demanding a written reply, the District Court ruled and the Court of Appeals affirmed that by delaying the actual hearing until after the termination, the Board had denied the teacher his rights to procedural due process under the Fourteenth Amendment:

> . . . there is a substantial difference in the position of the parties once termination has actually occurred. First, the employee, cut off from the payroll, is greatly disadvantaged in his ability to pursue the hearing remedy. He may be forced by the necessity for survival to seek other employment which will foreclose the pursuit of reinstatement. Second, the institution will have made substitute teaching arrangements, thus introducing into the hearing consideration of the interests of other faculty members. This inevitability will increase whatever tendency may already exist for the hearing officials to defer to the administration's decision. We agree with the district court, therefore, that *a hearing after the fact is not the due process equivalent of the pretermination hearing required by Perry* v. *Sinderman, supra.* (501 F.2d at 38) [emphasis added].

Similarly, in *Snead*, the three-judge court ruled that New York State was obliged not only to provide pre-layoff procedures, but

9. Plaintiff Skehan appealed the Third Circuit's failure to award him damages and attorney fees from the public officials involved. *Skehan* was vacated and remanded for reconsideration of those questions in light of this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. ..... (1975) and *Wood* v. *Strickland*, 420 U. S. 308 (1975). The Third Circuit decision regarding the substantive question of due process was unchallenged on appeal and stands.

also to meet a high standard of due process for a pre-suspension hearing where it was acting to place a civil service employee on involuntary mental health leave. Ruling that a psychiatrist's recommendation was not a substitute for ordinary due process, the Court stated:

> We hold that defendants must conduct an adversarial hearing *before* placing Civil Service employees in permanent status on involuntary leave of absence for mental unfitness in the absence of exceptional circumstances requiring immediate action. (355 F. Supp. at 773) [emphasis added].

Just last month, the three-judge court in the Southern District of New York ruled again on remand that Snead was entitled to back pay and expungement of the layoff from her personnel file. The Court thus held that the state's action rescinding the layoff and reinstating Snead had not rendered the case moot, and reaffirmed that the State acted in violation of Snead's rights under the Fourteenth Amendment. *Snead, supra*, on remand, F. Supp. ..... (S. D. N. Y. 7/22/75). In sum, the decision of the Seventh Circuit in the instant case is not only grounded firmly in the consistent line of cases on this subject from this Court but also accords with the Seventh Circuit's own opinions and those of the Southern District of New York and Third Circuit in similar cases decided within the last two years.

2. Certiorari in This Case Is Not Warranted by Any Conflict with the Illinois Supreme Court Decision in Kropel v. Conlisk.

Petitioner also seeks certiorari from this Court on the grounds that the opinion of the Seventh Circuit that the procedures of the Chicago Fire Department are unconstitutional is in conflict with a recent decision of the Illinois Supreme Court, *Kropel* v. *Conlisk*, 60 Ill. 2d 17, 322 N. E. 2d 793 (1975). In *Kropel*, the Illinois Supreme Court was confronted with a challenge to the section of the Illinois Revised Statutes providing for dis-

cipline of police officers in cities over 500,000 (*Ill. Rev. Stat.* Ch. 24, § 10-1-18.1):

> **10–1–18.1 Police removals or suspensions—Cities over 500,000—Notice—Hearings—Determinations.]** § 10–1–18.1. In any municipality of more than 500,000 population, no officer or employee of the police department in the classified civil service of the municipality whose appointment has become complete may be removed or discharged, or suspended for more than 30 days except for cause upon written charges and after an opportunity to be heard in his own defense by the Police Board . . .
>
> Upon the filing of charges for which removal or discharge, or suspension of more than 30 days is recommended a hearing before the Police Board shall be held . . .
>
> A majority of the members of the Police Board must concur in the entry of any disciplinary recommendation or action.
>
> Nothing in this Section limits the power of the superintendent to suspend a subordinate for a reasonable period, not exceeding 30 days.

Kropel, a police officer in Chicago, had been suspended for thirty days without any prior due process; under § 10-1-18.1, unlike § 10-1-18, *supra*, p. 5, Kropel was not even entitled to a review of his suspension. In its decision, the Illinois Supreme Court essentially rewrote § 10-1-18.1 of the state statute, mandating the Police Board to provide in its regulations for appeal from such suspensions, despite the absence of any statutory requirement to do so.[10] After imposing on the Police Board an obligation to provide Kropel and the other Chicago Police with at least post-discipline review of suspensions numbering fewer than thirty days, the Illinois Supreme Court ruled that the Police Department's actions suspending Kropel with no *prior* hearing could be saved from constitutional attack.

10. The State Court ruled that the statutory provisions governing the police under § 10-1-18.1 must be made uniform with the statutory provisions for all other state and municipal civil servants, all of which provide post suspension appeal from suspension of more than one week.

Even assuming *arguendo* that the ruling of the Illinois Court was ever a valid statement of constitutional principle,[11] as the Seventh Circuit pointed out in *Muscare*, the *Kropel* Court "did not have the benefit of the United States Supreme Court's decision in *Goss* v. *Lopez*" (App. B, p. 9a-10a) reiterating the right to elementary due process prior to deprivation of a property interest cognizable under the Fourteenth Amendment. The conflict between the decision of the Illinois Court in *Kropel* and this Court's opinions in *Roth, supra; Arnett, supra* and *Goss* v. *Lopez* might be a basis for certiorari in *Kropel*, but that issue is not presently before this Court.[12]

In the case at hand, the Seventh Circuit has ruled, consistent with this Court's decisions in *Roth, Arnett* and *Goss* that the procedures of the Chicago Fire Department conflict with the provisions of the Fourteenth Amendment. Under the decision of the Illinois Supreme Court in *Kropel*, the Chicago Police Department is obliged to provide its members with a review procedure for under thirty day suspensions. By providing further for fair notice and hearing prior to such suspensions as well, the Police Department can conform to the Seventh Circuit's opinion in *Muscare* without violating any of the Illinois Court's decision in *Kropel*. There is thus no conflict requiring resolution by this Court, and the Petition for Certiorari should be denied.

11. The Illinois opinion is utterly devoid of any reference to the applicable decisions of this Court or of the U. S. Court of Appeals for the Seventh Circuit regarding the application of the due process clause to public employees. Nonetheless, the *Kropel* Court appears to conclude without any authority that due process will be satisfied if plaintiff Kropel is given an opportunity to seek review of his suspension, consistent with the rights of his counterparts outside the police force.

12. Rule 19(a) of the U. S. Supreme Court Rules providing for certiorari, "where a State court has decided a federal question of substance . . . in a way probably not in accord with applicable decisions of this Court" might recommend this Court's review of the decision in *Kropel*, if that were at issue here.

3. The Ruling of the Court of Appeals Was Amply Supported by the Record in This Action.

Petitioner has represented to this Court that: "In fact, Muscare had ample notice of the charges against him and did respond to them. Furthermore, Muscare admittedly was in violation of Departmental Regulations and admittedly disobeyed an order of his superior office. The only issues to be settled were whether the Regulations and Order were constitutional and these questions could not be determined in an administrative hearing. These issues were judicially determined. Muscare received due process in abundance." (Pet. Br. pp. 30-31). Insofar as these issues of fact are relevant to this Petition for Certiorari, Petitioner is apparently attempting to contend that the decision of the Seventh Circuit was without sufficient basis in the record.

Petitioner contends that "In fact, Muscare had ample notice of the charges against him and did respond to them." To the contrary, it is uncontraverted evidence of record that after an ambiguous casual remark in December, Lieutenant Muscare was summarily separated from his job and income by the appearance of three of his superior officers in his fire house on February 27, 1974 with the curt order that he was being suspended and to turn in his equipment. Five days later, the Fire Department first notified Lt. Muscare of the Fire Department Rules that he had allegedly violated. At no stage of these proceedings did Petitioner refute Lt. Muscare's contention that he had been suspended for twenty-nine days prior to any notice of the Regulations he is alleged to have violated and consequently with no prior opportunity to respond to those charges. Indeed, as the Seventh Circuit found, "no hearing of any kind was afforded Appellant prior to his suspension." (App. B, p. 11a).

Petitioner's further contentions that: (1) "Furthermore, Muscare admittedly was in violation of Departmental Regulations

and Admittedly Disobeyed an order of his superior officers; the only issues to be settled were whether the regulations and order were constitutional and these questions could not be determined in an administrative hearing," and (2) "these issues were judicially determined. Muscare received due process in abundance" are not only without any foundation in this record; they are irrelevant to the ruling of the Seventh Circuit in this action. Since Lt. Muscare was not told of the identity of the charges against him until after he was suspended, he never had any opportunity to contest the validity of those charges. When pursuing his federal constitutional remedies in federal court, Muscare set forth the federal constitutional prohibitions against the actions being taken against him. The Court of Appeals correctly ruled that, regardless of what defenses against the Department's charges he would have made, he was constitutionally entitled to make them prior to being separated from his work.

Plainly, no later review could provide Lt. Muscare with the prior due process to which he was entitled before the suspension was levied against him. Petitioner's contention throughout this proceeding that Lt. Muscare's failure to "exercise his statutory right to an administrative review" (Pet. Br., p. 31) somehow precludes him from presenting his federal constitutional case challenging the absence of prior due process is utterly without any foundation in any applicable authority. It is well-settled law that, under 42 U. S. C. § 1983, a person may pursue his federal remedies without exhausting any available administrative remedies provided by the State system, *McNeese* v. *Board of Education for Community Unit School District 187*, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963); *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Yet in face of this unbroken line of authorities establishing Muscare's unquestionable right to pursue his federal remedies for violation of his constitutional rights, Petitioner consistently reiterates the fact that Muscare failed to exercise his statutory right to administrative review, as if that had any bearing on this action.

Petitioner's conclusion that "Muscare was afforded due process in abundance" is nothing but a groundless, self-serving conclusion. Muscare's own pursuit of his constitutional remedies in federal court does not remedy the violation of his Fourteenth Amendment rights, a violation which was completed as of the moment on February 27, 1974, when his superiors ordered him from the premises of his fire station. To contend that a plaintiff's later pursuit of his constitutional remedies in federal court could somehow retroactively make up for an earlier violation of his constitutional rights to due process by his public employer is circular reasoning of the purest sort. Indeed, under that theory, the availability of a later federal action under the Fourteenth Amendment would completely negate any requirement for any due process hearing in any case, and states would be liberated to ignore the due process clause entirely.

4. This Court Is Without Jurisdiction to Determine the Validity of the Fire Department's Hair Rule.

Finally, the ruling of the Seventh Circuit reversing the District Court's denial of Muscare's relief begins again the proceedings in the District Court. In light of the Seventh Circuit's finding of a violation of Muscare's right to procedural due process, they were not required to determine whether or not the Fire Department's regulation governing personal appearance violated Muscare's constitutional rights, and the Court specifically withheld its opinion:

> "On this appeal, Lt. Muscare strenuously argues that this circuit's decision in *Breen* v. *Kahl*, 419 F. 2d 1034 (7th Cir. 1969) cert. den., 398 U. S. 937 (1970), compels a recognition of the "right to wear one's hair at any length or in any desired manner [as] an ingredient of personal freedom protected by the United States Constitution." 419 F. 2d at 1047, and requires an invalidation of the Department's regulation, absent any showing of "substantial justification" for the restrictions . . .

> . . . we find it unnecessary to resolve that controversy in this case, for appellant was suspended without procedural due process." (App. B., pp. 6a, 7a.)

Thus, this Court does not have before it any ruling from the Court of Appeals regarding whether or not the personal appearance regulations violate Muscare's constitutional rights, and there is no basis for this Court to rule on this issue. *Beilan* v. *Board of Public Education School District of Philadelphia*, 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed. 2d 1414 (1958) n. 3 at 402; *Carroll* v. *United States*, 354 U.S. 394, n. 2 at 396, 77 S.Ct. 1332, 1 L.Ed.2d 1442 (1957). Should this Court affirm the ruling of the Seventh Circuit, the question of the constitutionality of the appearance rule will remain beyond the scope of this case. The question of the appearance rule arises only if this Court should determine to reverse the ruling of the Seventh Circuit regarding procedural due process. In that case, the Court has jurisdiction itself to affirm the *result* reached by the Circuit Court on the alternative grounds that Lt. Muscare was subject to other violations of his constitutional rights[13] or simply to reverse the Court of Appeals and remand for their finding regarding the appearance rule. In no instance should this Court now rule to "affirm" the finding of a one judge district court regarding an issue on which the Court of Appeals has never ruled.

CONCLUSION.

In conclusion, the Seventh Circuit Court of Appeals ruled that the procedures of the Chicago Fire Department as enforced against Lt. Muscare in this case constituted a violation of his rights under the Fourteenth Amendment of the United States Constitution. In so deciding, the Seventh Circuit was following the decisions of this Court and of the other Courts of Appeals on this issue. Nothing in the opinion of the

13. *Helvering* v. *Gowran*, 302 U.S. 235, 58 S.Ct. 154, 82 L.Ed. 224; *S.E.C.* v. *Chenery*, 318 U.S. 80 63 S.Ct. 454 87 L.Ed. 626 (1943).

Seventh Circuit in this case warrants this Court taking the extraordinary action of certiorari or mandamus in the instant case, and no such writ should issue.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division.

FRANCIS MUSCARE,
Plaintiff,

vs.

ROBERT J. QUINN, individually, and as Commissioner, Chicago Fire Department,
Defendant.

No. 74 C 656

TRANSCRIPT OF PROCEEDINGS.

had in the above-entitled cause before the Honorable Frank J. McGarr, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, March 29, 1974, at the hour of 10:00 o'clock a.m.
Present:

Messrs. Jacobs, Gore, Burns & Sugarman (201 North Wells Street, Room 2122, Chicago, Illinois, 60606), by Mrs. Linda Hirshman, appeared on behalf of the plaintiff;

Mr. Richard L. Curry, Corporation Counsel, City of Chicago (City Hall, Room 511, Chicago, Illinois, 60602), by Mr. Phillip M. Sheridan, Assistant Corporation Counsel, appeared on behalf of the defendant.

[2] The Clerk: 74 C 656, Francis Muscare versus Robert J. Quinn, et certera, ruling on plaintiff's motion to reconsider previous ruling and for a further status report.

The Court: I have the motion for amendment of judgment filed by the plaintiff in this case, with a memorandum in support of it. And I have reviewed the matter. And it becomes, in effect, a motion for reconsideration of an earlier ruling.

And my ruling at this time is that the motion for reconsideration and the motion for amendment of judgment are both denied.

This leads me to inquire of you, Counsel, where we go from here; what is the next step?

Mrs. Hirshman: Your Honor, you were, in addition, going to rule on the remaining constitutional challenges, which were still open at the last hearing.

The Court: Well, they were implicit, were they not, in your motion for reconsideration?

Mrs. Hirshman: Well, the motion for reconsideration of the denial of the preliminary injunction. However, there was also a motion for ruling on the remaining issues. Your ruling—if your denial of my motions intends to encompass the other issues—

The Court: I recall your raising this point, but procedurally I really don't know what I can do concerning it. There was a motion for a preliminary—petition for a preliminary [3] injunction. We had a hearing on it and that was denied. Procedurally that is all I can do.

I regard your raising the remaining issues as an additional argument. And to that extent, my ruling, I suppose, is a ruling on those.

But what we have procedurally is a denial of a petition for a preliminary injunction; and that denial has just been reaffirmed. And where you go from there, I don't know. I would assume that you would want to go as fast to the Court of Appeals as you can.

Mrs. Hirshman: The only thing that remains open in my mind, your Honor, is that when you ruled on the preliminary injunction your findings of fact and conclusions of law were directed to one of three arguments which we raised. And before

we go to the Court of Appeals—or hopefully not requiring us to go to the Court of Appeals—I would like to ask you, as I thought I had last week, to rule on the remaining challenges.

The Court: Well, in effect, what I am saying is that you asked me to do so. I considered them—I considered them before, you argued them, in a sense, they are in your brief; and the denial of the petition for a preliminary injunction is deemed to be a ruling on all the challenges you raised,

Mrs. Hirshman: Thank you.

The Court: I think you have to so consider it.

Mrs. Hirshman: In that case, since we have no further [4] evidence to offer, I would ask that you make this a final ruling.

The Court: All right. The order will be that the preliminary injunction heretofore entered is made a final and permanent injunction, which in my mind renders it an appealable order. And see what the Court of Appeals has to say about it.

Mrs. Hirshman: Thank you, your Honor.

Mr. Sheridan: Thank you.

(Which were all the proceedings had in the above-entitled cause this date.)

Supreme Court, U. S.
FILED
SEP 15 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-130

ROBERT J. QUINN, individually and as Commissioner of the Chicago Fire Department,

Petitioner,

vs.

TOM C. CLARK, Justice, JOHN S. HASTINGS, Circuit Judge, JOHN PAUL STEVENS, Circuit Judge, FRANK J. McGARR, District Judge, and FRANCIS MUSCARE,

Respondents.

REPLY BRIEF OF PETITIONER

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Respondents.

REPLY BRIEF OF PETITIONER

Concerning the Statement of the Case

1. Respondent Muscare's statement of the case presents his suspension without its background. By dramatizing only the last act, with no exposition of how the protagonist got in his predicament, he endeavors to make it seem as though his superior officers suddenly, without warning, descended upon him and, without explanation, abruptly and arbitrarily threw him out of the fire station.

Actually Muscare's deficiencies as an employee had a history of some three years. According to his own testimony, he had violated the departmental safety regulation concerning facial hair and had twice acknowledged the purport and force of that regulation by grudgingly complying with it, only to violate it again. His contemptuous defiance of the regulation and of the orders of his superiors was open and unmistakable.

2. The brief in opposition (p. 3) filed in Muscare's behalf to the contrary notwithstanding, he presented no evidence in support of his challenge to the departmental grooming regulation beyond his own bare, unproven assertion that he could get a good seal on his gas mask while wearing a beard.

3. Petitioner does not deny that respondent Muscare duly raised the issue of due process in his complaint. But at the hearing on March 19, 1974, the only evidentiary hearing had in the case, that on Muscare's application for a preliminary injunction, Muscare made no attempt to prove that he had been "cut off from his job" without notice, without an opportunity to be heard in his own defense. In fact, Muscare's brief testimony established precisely the contrary.

It was in his "motion to consider previous ruling," presented 10 days later on March 29, 1974, that his counsel, by way of afterthought, did request the court "to rule on the remaining constitutional challenges" (Brief in Opposition, p. A2). The district court ruled that it deemed itself to have "considered them" since they were "in a sense . . . in your brief" and therefore "the denial of the petition for a preliminary injunction is deemed to be a ruling on all the challenges you raised" (*id.*, p. 3).

4. Muscare's argument, tucked away in his statement of the case (Brief in Opposition, p. 4), to the effect that "[i]n thus rejecting Petitioner's contention that the procedures already available under Illinois law satisfied the requirements of due process, the Court of Appeals was not called upon and did not pass on the constitutionality of that law itself" is based on a distinction without a difference. In Justice Holmes' phrase, "it will not wash".

ARGUMENT

I.

IF RESPONDENT MUSCARE'S DUE PROCESS CLAIM, ATTACKING THE STATE STATUTORY PROCEDURE OF STATEWIDE APPLICATION, PURSUANT TO WHICH HE WAS SUSPENDED, WAS SUBSTANTIAL, ITS RESOLUTION REQUIRED THE CONVENING OF A THREE-JUDGE DISTRICT COURT.

Muscare's brief in opposition (pp. 4,5) is inaccurate in stating that the petitioner has represented and conceded that a three-judge district court was not required at the time of the hearing on Muscare's application for an injunction. Our petition said no more than "it is possible" this was so. It would be so only if the respondent had abandoned his due process contentions. He had apparently done just that at that point, since due process was not mentioned by respondent at the contested hearing on his application for an injunction, the only trial that was had in this case.

The relief sought in the complaint required the summoning of a three-judge district court. However, countless claims are alleged in complaints that are forgotten and abandoned at trial. A three-judge court need not be convened in order to dispose of insubstantial constitutional claims. *Ex parte Poresky,* 290 U.S. 30 (1934); *Bailey* v. *Patterson,* 369 U.S. 31, 7 L.Ed. 2d 512 (1962). As Judge Friendly remarked in *Utica Mutual Insurance Co.* v. *Vincent,* 375 F. 2d 129, at 131 (2 Cir., 1957), "Congress could not have intended to require three judges to be assembled when decisions could not possibly go in any manner save one." From the summary manner in which District Judge McGarr disposed of Muscare's due process claims, which Muscare had lamely attempted to reassert in his "motion to reconsider" (Brief in Opposition, pp. A1-A3), it is plain that the judge considered the due process claims insubstantial.

But if the due process claims were substantial, a three-judge court was required. A suspension of a civil service employee, effected pursuant to a state statute of statewide application, cannot be enjoined on the ground that the statutory procedure violates the federal constitution, except by a three-judge district court. A constitutional claim that prevails is necessarily substantial. The court of appeals exceeded its jurisdiction in undertaking to perform what could be done only by a three-judge district court, from which appeal to this Court lies of right. When the court of appeals perceived that it disagreed with the single district judge as to the substantiality of the constitutional claims, it should have returned the case to the district court with an appropriate direction to convene a three-judge panel.

Respondent's reliance (Brief in Opposition, pp. 7,8) on *Dusch* v. *Davis,* 378 U.S. 112, 18 L.Ed. 2d 656 (1967), and *McCrimmon* v. *Daley,* 418 F. 2d 366 (7 Cir., 1969), in arguing that the injunction herein is of only local import, is misplaced.

In *McCrimmon* the legislation challenged was a municipal ordinance restricting the employment of women as bartenders. The state statute involved was merely enabling legislation empowering municipalities to adopt such enactments.

Similarly, in *Dusch* v. *Davis,* 387 U.S. 112, 18 L. Ed. 2d 656 (1967), the legislation, there challenged under the "one-person, one-vote" rule, was merely a consolidation plan adopted by one city—Virginia Beach, Virginia—and one county—Princess Anne County, Virginia—to form a city under a borough type of government. The only state statutes involved were mere enabling legislation, which in no way contravened the "one-person, one-vote" principle, and a city charter amendment, which, although enacted by the state legislature, was of local import only.

In the instant case, on the contrary, the state statute involved is not a measure merely authorizing enactment of local legislation, if the individual municipality so chooses. Here the state statute is a statewide civil service law expressly directing and commanding all municipalities in the State of Illinois to follow certain procedures in suspending certified civil service employees. The statute in question—Illinois Rev. Stat. 1973, ch. 24, par. 10-1-18—affirmatively provides:

> "Except as hereinafter provided in this section, no officer or employee in the classified civil service of any municipality who is appointed under the rules and after examination, may be removed or discharged or sus-

> pended for more than 30 days, except for cause upon written charges and after an opportunity to be heard in his own defense. . . . Nothing in this Division limits the power of any officer to suspend a subordinate for a reasonable period, not exceeding 30 days, except that any employee or officer suspended for more than 5 days or suspended within 6 months after a previous suspension shall be entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension. . . ."

That is not mere enabling legislation.

It is noteworthy that in *Goss* v. *Lopez,* ..... U.S. ....., 42 L. Ed. 2d 725 (1975), the case upon which the Seventh Circuit and respondent Muscare have principally relied, a three-judge district court was convened, as was noted, without disapproval, by this Court (42 L. Ed. 2d at 731, fn. 3), on the ground that, as here, "the complaint sought to restrain the 'enforcement' and 'operation' of a state statute by restraining the action of any officer of such state [in *Goss,* city high school principals] in the enforcement or execution of such statute." This Court found the Ohio "statute unconstitutional insofar as it permits such suspensions without notice or hearing" (42 L. Ed. 2d at 740).

Muscare was suspended pursuant to state statute for a period of 29 days. Under the statute, he had a right to a hearing before the civil service commission on the propriety of the suspension. He failed to exercise that right.

The court of appeals concluded that this procedure denied Muscare due process under the federal constitution and held that the district court erred in denying him an injunction against his being suspended pursuant to this statutory procedure.

This is a decision which vitally affects the employment situation of many thousands of civil service employees in Illinois and which must materially influence the conduct of management-employee relations in public affairs in that state. Such a decision lies wholly within the jurisdiction of a three-judge district court. The judgment of the Court of Appeals is void.

II.

THE COURT OF APPEALS HAS MISCONSTRUED THE MAJORITY OPINION OF THIS COURT IN GOSS v. LOPEZ.

Respondent Muscare and petitioner are in evident agreement that the Seventh Circuit's interpretation of this Court's opinion in *Goss* v. *Lopez,* ..... U.S. ....., 42 L.Ed. 2d 725 (1975), was determinative of the result reached below in the matter at hand. But the statement of Muscare's counsel (Brief in Opposition, p. 11) that petitioner is "misrepresenting this Court's opinion in *Goss*" is unwarranted.

The complaint filed by the plaintiff students in *Goss* alleged (42 L. Ed. 2d 730) that they had been denied due process because they had been suspended "without a hearing either prior to suspension or within a reasonable time thereafter." The students, who had been suspended because of their allegedly disruptive misconduct on school premises (42 L.Ed. 2d at 732), did not demand a presuspension hearing.

It is true, the majority opinion of Mr. Justice White in *Goss* does state (42 L.Ed. 2d at 739) that "as a general rule notice and hearing should precede removal of the student from school." But these words were uttered in the context of the school situation, where, as Mr. Justice White stated, "[i]n the great majority of cases the disciplinarian may informally discuss the alleged misconduct

with the students minutes after it has occurred" (42 L.Ed. 2d at 739). The civil service scene, at least in large cities, is not the same. Muscare's suspension did not become effective until it had been reviewed and authorized by the Fire Commissioner (R. 17, p. 112).

In *Goss* the majority opinion also declared (42 L.Ed. 2d at 740):

> "We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial type procedures might well overwhelm administrative facilities in many places. . . . Moreoveor, further formalizing the suspension process and escalating its formality and adversary nature may . . . make it too costly as a regular disciplinary tool. . . ."

Muscare is conveniently silent as to whether or not he contends he is entitled to a trial-type presuspension hearing as a matter of constitutional imperative, or whether he admits due process would be satisfied if he were afforded the informal opportunity to state his case, opportunity of the type authorized by the majority opinion of this Court in *Goss*.

To keep to the facts of the case at bar, Muscare had ample opportunity to set forth his point of view as to the licity of the department facial hair rule. As he himself testified, he had, over a period of three years, twice before grown a beard, been reprimanded, had his say, been overruled, been ordered to shave and at length had complied.

Knowing all this, he again let his facial hair grow in direct defiance of his superior's orders (R. 17, pp. 97,98). All this occurred prior to his suspension.

Even if Muscare were correct in his reading of *Goss*, his every right to a presuspension hearing under his interpretation of that case, was in fact satisfied.

But we do not concede that the majority opinion of the Court in *Goss* makes a presuspension hearing constitutionally imperative. The statement of the Court that "as a general rule, notice and hearing should precede removal of the student from the school", we maintain, means that, as a matter of policy, it is more desirable that the hearing, if feasible or even if possible, precede disciplinary action. Of course, from the employee's point of view, though probably not from the employer's, it is more desirable, if it can be arranged. But that does not make it a constitutional requirement.

III.

THE SEVENTH CIRCUIT HAS MISREAD ARNETT v. KENNEDY ALSO.

The Brief in Opposition (p. 11) takes the position that the decision of the Seventh Circuit is confirmed by this Court's disposition of *Arnett* v. *Kennedy*, 416 U.S. 134 (1974). The Seventh Circuit in fact so stated (Petition, pp. 11a, 12a).

It is true, as the Brief in Opposition (p. 11) remarks, the federal employee in *Arnett* (which concerned not a suspension, but a dismissal) was by statute afforded pre-suspension administrative procedures, including 30 days prior notice, access to the derogatory material against him, and the right to respond both orally and in writing. But the

employee contended due process required a trial-type hearing, including right to counsel and to present witnesses in his behalf, together with the right to cross-examine adverse witnesses. The majority of this Court disagreed and held that a trial-type hearing was not required. In doing so, it reversed a three-judge district court in the northern district of Illinois, sitting in the jurisdiction of the Seventh Circuit.

In the case at bar, the Seventh Circuit believed that the two concurring justices in *Arnett*—Mr. Justice Powell and Mr. Justice Blackmun—"concurred in the result *solely* because they believed that the statute's provision of notice and opportunity to be heard *prior* to discharge satisfied the minimal requirements of constitutional due process" (Petition, pp. 11a, 12a; emphasis supplied). But Mr. Justice Powell's concurring opinion in *Arnett,* in addition to the language we have already cited in our petition (p. 27), concerning the need of the government to act expeditiously in removing an unsatisfactory employee, contains the following statement in footnote 4 (40 L. Ed. 2d at 41, 42):

> "[T]he fact that some federal agencies may have decided to hold evidentiary hearings cannot mean that such a procedure is constitutionally mandated. The Federal Government's general practice to the contrary argues that efficiency is in fact thought to be adversely affected by prior evidentiary hearings."

The concurring opinion also considered due process not to require an impartial pre-removal hearing officer, for the reason that "an important decision-maker is provided at the post-removal hearing where the employee's claims are finally resolved" (40 L.Ed. 2d at 42, fn. 5).

Under *Arnett,* advance notice and the right of the employee to make an informal written presentation do satisfy

due process, but they are not constitutionally required. We submit that a careful reading of the several opinions in *Arnett* supports this interpretation.

In any event, respondent Muscare had *de facto* at least as much notice and opportunity to state his case as the employee in *Arnett* v. *Kennedy* did.

Muscare had twice before been ordered to bring himself into conformity with the departmental regulation of facial hair and he had twice complied by shaving. The third time he stated his opinion concerning the rule at the Fire Academy and deliberately refused to comply.

The language in *Board of Regents* v. *Roth,* 408 U.S. 511, at 569, 570 (1972), that is quoted in the Brief in Opposition (p. 13), to the effect that "when protected interests are implicated, the right to some kind of prior hearing is paramount", was not necessary to this Court's decision in that case, which reversed the Seventh Circuit and held that a non-tenured faculty member in a state college has no protected interest in his employment beyond the period of his contract and is not entitled to due process concerning his non-retention. It was therefore *obiter dicta.* Nor is there a parallel between *Roth* and the instant matter, since Roth was given no reason whatsoever for his non-retention, whereas Muscare knew full well why he was being suspended. The very complaint Muscare filed in this case shows that he understood he had been disciplined because of his long-standing violation of the departmental regulation concerning facial hair and his defiance of his superiors' orders to shave off his beard.

As for *Perry* v. *Sinderman,* 408 U.S. 593 (1972), cited in the Brief in Opposition (pp. 13, 14), we are unable to agree that it stands for the proposition that a "pretermina-

tion hearing [is] required". The issue to which the Court addressed itself there was whether a nontenured junior college teacher had acquired *de facto* tenure and therefore was entitled to due process with respect to his non-retention. The Court remanded the case to the district court for a hearing on "the legitimacy of his claim of such entitlement in light of 'the policies and practices of the institution'." It was noted by this Court that proof of such interest would not entitle Sinderman to reinstatement, "[b]ut such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his non-retention and challenge their sufficiency" (at 603). Thus the hearing envisioned by *Perry* v. *Sinderman* is similar to the post-suspension hearing, at the request of the employee, authorized by the Illinois civil service statute (Ill. Rev. Stat. 1969, ch. 24, par. 10-1-18) and endorsed and mandated by the Illinois Supreme Court in *Kropel* v. *Conlisk*, 60 Ill. 2d 17 (1975).

IV.

A CONFLICT DOES EXIST BETWEEN THE ILLINOIS SUPREME COURT AND THE SEVENTH CIRCUIT ON THE CONSTITUTIONAL ISSUE PRESENTED BY THIS CASE.

The assertion is made in the Brief in Opposition (p. 17) that no conflict exists here between the Illinois Supreme Court and the Seventh Circuit, since the Chicago authorities can conform to the Seventh Circuit's ruling by granting presuspension hearings in all cases, without vitiating the Illinois Supreme Court's ruling that in cases of suspensions of 30 days or less, a postsuspension hearing satisfies due process. This theory is both amazing and amusing. Respondent Muscare thus argues that no conflict, justifying

this Court's intervention, will exist if the City will obligingly ignore its rights as they have been determined by the highest court of its state.

It is with a rule of law that we are here concerned. The Illinois Supreme Court holds that due process does not require a presuspension hearing, while the Seventh Circuit holds that due process requires a presuspension hearing. The question, of obvious importance, is, Who is right? The answer to that question can be given only by this Court.

In *Kropel* the Illinois Supreme Court authoritatively reviewed the history of the state civil service statutory provisions relating to employee suspensions. In that case, it is true, it was directly concerned with Illinois Rev. Stat., ch. 24, par. 10-1-18.1, which has to do solely with police officers in municipalities of 500,000 population or more (i.e. Chicago), whereas the general statewide civil service provision (Illinois Rev. Stat., ch. 24, par. 10-1-18) grants all civil service employees of Illinois municipalities, with the exception of Chicago police officers, suspended for 30 days or less, but more than one week, or twice or more within six months, the right to a postsuspension hearing, upon request, with the right to back pay, if vindicated. Par. 10-1-18.1 permitted Chicago police officers to be suspended for any period of 30 days or less without a hearing.

The Illinois Supreme Court ruled that par. 10-1-18, the general civil service provision, established a statewide policy of granting all civil service employees of municipalities, including Chicago police officers, if suspended for any period whatsoever of 30 days or less, the right, upon request, to a postsuspension hearing, with the right to recover backpay if vindicated.

In thus liberally construing these state statutes, the Illinois Supreme Court was exercising its constitutional power

as the final interpreter of Illinois law, and it did so expressly in order to safeguard the validity of the legislation in the light of both the state and federal constitutions (60 Ill. 2d at 19, 26).

Common sense suggests that most civil service suspensions are for 30 days or less—most commonly, for but a few days or even only one day. Common sense also suggests that most such suspensions are justified and that if mistakes occur, they will usually be righted by informal means. Usually, indeed, the employees does not contest the fairness of the discipline and accepts the penalty without a hearing. Requiring the municipality affirmatively to establish the correctness of every invocation of managerial authority before meting out any suspension, no matter how brief, would place a burden on the municipality that in most cases would be completely unnecessary and disruptive of governmental efficiency.

V.

THIS COURT HAS JURISDICTION TO DETERMINE THE VALIDITY OF THE CHICAGO FIRE DEPARTMENT RULE LIMITING THE AMOUNT OF FACIAL HAIR THAT MAY BE WORN BY ITS FIREFIGHTERS.

We are also unable to agree with respondent Muscare's "heads-I-win-tails-you-lose" argument (Brief in Opposition, pp. 20,21) that this Court is without jurisdiction to determine the validity of the Chicago Fire Department's rule limiting the amount of facial hair a uniformed firefighter may wear.

Of course, if the Court issues a writ of mandamus, the judgment of the single-judge district court will be voided, including its upholding of the rule as valid, and the constitutionality of the facial hair regulation will have to be adjudicated over again before a three-judge district court, if Muscare continues to press his case.

If, however, the Court denies mandamus, but grants certiorari and reverses the court of appeals, that will reinstate the judgment of the single-judge district court, which has been set aside by the court of appeals. The failure of the court of appeals to rule on the constitutionality of the regulation resulted from that court's erroneous view of the requirements of due process and its own deliberate choice. However, the court of appeals did intimate considerable sympathy for Muscare's point of view on this issue (Petition, pp. 62-82), although that contention is contrary to the weight of authority, as is indicated by the Seventh Circuit's own opinion (Petition, p. 7a, fn. 2). The petitioner has duly raised the issue in his statement of the questions presented by this petition, and, we submit, this Court can properly consider and rule on the issue. Rule 40 (1) (d) (2) of the Rules of this Court.

In the event this Court grants certiorari, but affirms the court of appeals, the holding of the single-judge district court that the rule does not infringe Muscare's constitutional rights will still stand, absent a reversal of that holding by this Court, unless this Court remands the case to the court of appeals with directions to pass on the issue, and that tribunal then holds the rule invalid, and this Court then either denies certiorari or grants it and upholds invalidation of the rule.

If this Court affirms the court of appeals on the due process issue without reaching the question of the validity of the rule, it would seem that the probable result would be for Muscare to be awarded back pay for the period of his suspension. But that would not prevent the department

from instituting new presuspension disciplinary proceedings against Muscare for his patent infractions of department rules, and it would seem to be its duty to do so.

The discussion of this point in the Brief in Opposition is inconsistent. On the one hand, it states baldly (p. 20) that "[t]his court is without jurisdiction to determine the validity of the fire department's hair rule". Yet, on the other hand, the Brief in Opposition argues (p. 21) that if this Court reverses the Seventh Circuit on due process issues, this Court then has jurisdiction to affirm the result reached by the court of appeals "on the alternative grounds that Lt. Muscare was subject to other violations of his constitutional rights" that is, suspension for violation of a rule alleged to be unconstitutional.

If this Court has jurisdiction to hold the departmental rule invalid, as respondent Muscare maintains and admits, then it has jurisdiction to hold it valid.

CONCLUSION

The writ of mandamus should issue.

In the alternative, a writ of certiorari should issue, the judgment and opinion of the Court of Appeals for the Seventh Circuit should be reversed, and the judgment of the District Court for the Northern District of Illinois should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-130

ROBERT J. QUINN, individually and as Commissioner of the Chicago Fire Department,

Petitioner,

vs.

FRANCIS MUSCARE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER

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IN THE

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On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The findings of fact, conclusions of law and judgment of the district court in favor of the petitioner are unreported, but are reproduced in the Appendix (pp. 146-153).

The opinion of the court of appeals, filed on March 21, 1975, reversing the judgment of the district court, is reported at 520 F.2d 1212 (7th Cir., 1975), and is reproduced in the Appendix (pp. 158-166).

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1975 (App. 167). On June 17, 1975, the court of appeals entered an order denying the petition of defendant Quinn for a rehearing with suggestions for rehearing in banc (App. 167, 168).

The petition for a writ of certiorari was filed on July 24, 1975. 44 L.W. 3069. It was granted on October 14, 1975. 44 L.W. 3222.

The jurisdiction of this Court rests on 28 U.S. Code § 1254(1).

A petition for a writ of mandamus, based on the issue of the need to convene a three-judge district court herein, was filed by petitioner together with his petition for a writ of certiorari. This petition for mandamus was denied by the Court on October 14, 1975. 44 L.W. 3222. It is assumed in this brief that the question of a three-judge district court was disposed of by that denial of mandamus.

QUESTIONS PRESENTED

(1) Whether, in suspensions for 30 days or less of civil service employees, due process is satisfied by provision for post-suspension hearings, with the right to back pay and deletion of the suspension from the employee's service record, in the event the charges against the employee are disallowed.

(2) Whether a civil service employee, who has been accorded a suspension of 30 days or less, can complain that he has been denied due process if he fails to exercise his statutory right to a post-suspension hearing.

(3) Whether, in the event due process requires a pre-suspension hearing, any administrative hearing must be held if the civil service employee has actual knowledge of the charges against him, knows that he is in violation of a departmental rule and that the charge is based on that violation, and where the only disputed question is whether the rule is constitutional.

(4) Whether a city fire department can constitutionally regulate the dress and hair-style of its firefighters (1) to ensure the efficient operation of gas masks that all firefighters are required to wear in certain emergencies, (2) to present a well-groomed and uniform appearance or image to the public, or (3) to promote discipline in a paramilitary setting.

(5) Whether a city fire department can constitutionally promulgate general safety rules binding on all members of the department, even though such rules may not be actually necessary with respect to certain individual members.

CONSTITUTIONAL PROVISIONS, STATUTES AND ADMINISTRATIVE REGULATIONS INVOLVED

Constitution Of The United States

Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech . . ."

Amendment V:

> "[N]or shall any person . . . be deprived of life, liberty or property without due process of law."

Amendment XIV:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Code

Title 42, § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Illinois Revised Statutes 1973

Chap. 24, par. 10-1-18

> "Except as hereinafter provided in this section, no officer or employee in the classified civil service of any municipality who is appointed under the rules and after examination, may be removed or discharged or suspended for more than 30 days, except for cause upon written charges and after an opportunity to be heard in his own defense . . . Nothing in this Division 1 limits the power of any officer to suspend a subordinate for a reasonable period, not exceeding 30 days except that any employee or officer suspended for more than 5 days or suspended within 6 months after a previous suspension shall be entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension. . . ."

Rules and Regulations of the Chicago (Illinois) Fire Department

Section 51.133:

> "All members of the Chicago Fire Department shall present a clean and proper appearance in personal care and attire at all times. The face shall be clean-shaven, except that a non-eccentric mustache is permissible. Mustaches shall not extend beyond a line perpendicular to the corner of the mouth and the full upper lip must be readily visible.
>
> "Sideburns shall be trimmed short and shall be no lower than a line from the middle of the ear.
>
> "Hair shall be worn neatly and closely trimmed, and the hair outline shall follow the contour of the ear and slope of the back of the neck. It will be gradually tapered overall in order to present a neat appearance."

Part VI:

"OFFENSES, PROCEDURES AND PENALITIES IN RESPECT TO VIOLATIONS OF THE RULES AND REGULATIONS, PRACTICES AND PROCEDURES OF THE CHICAGO FIRE DEPARTMENT."

* * *

Section 61.006:

"Disobedience of Orders."

STATEMENT

The Facts

Respondent Francis Muscare has been a firefighter with the Chicago Fire Department since 1955. His rank is that of lieutenant.

From October, 1973, until the trial of this case in March, 1974, Muscare wore a beard (App. 5, 18). He did this despite a department rule, the existence of which he admitted he was well aware, limiting the facial hair which may be worn by firefighters to at most a small moustache and precisely limited sideburns, with no beard (App. 125).

Some three years before, Muscare had worn the same sort of moustache and beard. He had been ordered to shave off the beard, but refused (App. 123). In consequence, at a uniform inspection, his superior officers declined to inspect him and apparently he then at length brought himself into compliance by shaving.

The following year Muscare again grew a beard (App. 124). This time he was summoned before a departmental board, where he was told by a fire chief that he did not know the meaning of discipline and was commanded to shave off his beard before reporting for duty the next day. Muscare reluctantly complied on that occasion also (App. 125).

But in December, 1973, when Muscare appeared with his company at the Chicago Fire Academy for instruction in a two-day course in the use of self-contained breathing apparatus (safety masks), he was again wearing a beard. The instructor, Firefighter Leonard Johnson, later testified that he at that time, on the basis of

instructional material (App. 60), informed Muscare that facial hair should not be worn with the safety masks (App. 53). Muscare disputed this, contending that Boston and New York permit firemen to wear "long hair, beards and moustaches." However, he offered no proof of that (App. 53, 67, 68).

As Instructor Johnson explained at the trial (App. 62), the self-contained breathing apparatus consists of an air cylinder, a face piece, a breathing tube and the harness on which the tank is mounted. The whole apparatus can be carried on a man's back. The cylinder is charged to 2216 pounds of pressure per square inch and the gas mask can function for 30 minutes. The gas masks cost about $400 each (App. 100).

Each member of the class was expected to put the apparatus on, charge it and test it to determine whether he was getting a good facial fit with the apparatus charged and with the cylinder and regulator valves open, allowing the high pressure air to flow up through the regulator into the face piece (App. 53, 54). Johnson testified that not only facial hair, but eyeglasses, dentures, oddly shaped faces and sores and boils could interfere with a fireman getting a proper seal (App. 73).

Johnson stated he could tell, by watching a fireman do this, whether he had succeeded in obtaining a tight facial seal. (App. 54).

Muscare failed to charge or test his apparatus in the class at the Fire Academy (App. 54, 56).

On the second day of the class, each student was expected to walk up to the fifth floor of the Fire Academy and then back down to the first floor, with a gas mask on, sealed and functioning (App. 55, 56), Muscare did not do this and, in fact, did not even put the apparatus on (App. 56).

Instructor Johnson stated at the trial that he did not know whether Muscare, while wearing his beard, could get a good seal on a gas mask, because Muscare did not put the gas mask on and a gas mask can be tested only by a man putting it on (App. 71, 72).

After the class was concluded, Instructor Johnson reported Muscare's conduct in the class to the drillmaster (App. 70, 71). According to his complaint, Muscare was "warned" in December, 1973 (App. 5) "that he would not be permitted to continue working as a firefighter unless he shaved his beard off." A few days later, Muscare was advised that charges had been filed against him with the administrative authorities of the Fire Department (App. 19). But, because of the serious illness of the superior officer in whose jurisdiction it lay to determine what disciplinary action, if any, should be taken, the charges against Muscare were not acted upon until February 27, 1974, by which time they had been reviewed and authorized by the Fire Commissioner (App. 105, 108, 110). Meanwhile Muscare continued to wear a beard.

Muscare was disciplined not only for violating the facial hair provisions of Section 51.133 of the Rules and Regulations of the Chicago Fire Department, but also for refusing to carry out a direct lawful order of his superior officers, in contravention of Section 61.006 of the same Rules and Regulations.

On February 27, 1974, three superior officers of Muscare personally came to the fire station where he was on duty and informed him he had been suspended for 29 days, effective immediately.

Muscare did not exercise his statutory right, under Illinois law, to a hearing before the civil service commis-

sion. Illinois Revised Statutes, 1973, ch. 24, par. 10-1-18, provides:

> ". . . [A]ny employee or officer suspended for more than 5 days or suspended within 6 months after a previous suspension shall be entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension. . . ."

In the event the civil service commission finds the suspension unwarranted, the employee is entitled to reinstatement, back-pay and erasure of the suspension from his employment record.

Instead of seeking this administrative hearing, Muscare, on March 11, 1974, filed the instant civil rights action under 43 U.S.C. § 1983.

The Trial In The District Court

At the trial on March 19, 1974, Muscare rested on his complaint and supporting affidavit (App. 51). The City put in almost all the testimony (App. 51-121). Muscare then testified briefly in an attempt at rebuttal (App. 121-131).

Acting Chief Fire Marshall William F. Foley of the Chicago Fire Department was a witness for the defense (App. 99-121; 131-136). He explained that the department has used self-contained breathing apparatus, or gas masks, since 1958 (App. 100, 104). They are employed particularly in rescue operations in a hostile environment and in an irascible type of atmosphere containing highly toxic, poisonous gas. They are usually worn at the direction of the company officer. At present there are two such gas masks on each hook and ladder truck. All uniformed members of the Chicago Fire Department are required to be proficient in the use of such self-contained breathing apparatus (App. 103).

Safety, not appearance, Chief Foley declared, is the rationale for the departmental rule restricting the facial hair that may be worn by uniformed firefighters to small, precisely limited sideburns, with no beard (App. 118). Facial hair in excess of these limitations, Chief Foley explained, interferes with the operation of the gas masks. In firefighting mistakes can be fatal.

A fire department is a paramilitary organization, Chief Foley also stated, because the department has levels of rank and firemen are expected to carry out orders. The fire department is a uniformed force, and cleanliness and neatness are a part of being uniformed.

Another witness for the defendant was Al Lundin, an officer of the Mine Safety Appliance Company of Pittsburgh, manufacturers of personal protective devices and particularly of self-contained breathing apparatus used by the Chicago Fire Department. Mr. Lundin also taught a course in the use of such safety devices at the National Safety Council in Chicago, where he gave instruction in the basics of respiratory protection to a student body of safety directors of various companies located throughout the United States (App. 82, 83). Lundin declared it to be his expert opinion that facial hair would adversely affect the obtaining of a facial seal on self-contained breathing apparatus of the types used by the Chicago Fire Department. Lundin explained that a perfect seal is possible, so that, during tests with various odorants, "it feels like there is absolutely no leakage at all." During tests the individual fireman is expected to be able to carry on normal activities, such as talking and coughing, with his face sealed in the mask.

But although the gas masks are designed to fit all faces, the differences in facial sizes and shapes, Lundin elucidated, can result in facial hair having less effect on

obtaining a seal for some individuals than others. As he said, "it is very difficult to form a seal to the face under the best conditions, and facial hair is going to endanger that," and, as the fireman engages in various strenuous activities during the course of a fire, the seal is apt to be more easily broken if facial hair is worn.

Therefore, it was Lundin's expert opinion, that facial hair would adversely affect the obtaining of a facial seal on self-contained breathing apparatus of the types used by the Chicago Fire Department (App. 86-88).

Muscare testified briefly by way of rebuttal (App. 121-131). He stated he had been a member of the Chicago Fire Department almost 20 years. Muscare admitted he was familiar with the fire department regulation concerning facial hair and that he had read it at roll call. In fact, he volunteered the information that he had twice in the past been formally reprimanded for wearing a beard in violation of the rule, and that on each occasion he had complied by shaving it off.

Muscare affirmed he had tested the apparatus while wearing a beard and that he had gotten a good fit and the apparatus worked. But he did not attempt to validate that assertion by a demonstration in court. Muscare presented no expert witnesses on gas masks. Nor did he put any other firemen on the witness stand to recount their experience with the department's gas masks while wearing facial hair.

The Opinion Of The District Court

At the conclusion of the hearing on a preliminary injunction on March 19, 1974, District Judge Frank McGarr, in denying the application, entered oral findings of fact and conclusions of law (App. 146-150),

which he later made applicable to his denial of a permanent injunction on March 29, 1974 (App. 151-153).

The district judge affirmatively recognized that the wearing of facial hair is a form of expression protected by the First Amendment (App. 147). He found that Muscare's appearance, as depicted in the photographs he introduced into evidence as Plaintiff's Exhibits A and B was substantially identical with his appearance in the courtroom (App. 147, 148). The court found that Muscare's small moustache was not in violation of departmental regulations, but that his full goatee, or small beard, was "clearly prohibited" by Regulation 51.133 of the Chicago Fire Department.

The question presented, the court stated, is "whether this regulation is a violation of the plaintiff's rights to First Amendment expression or whether, in fact, it is a reasonable curtailment of his rights for some justifiable and good reason which the Department advances" (App. 147, 148).

The district court did not regard as determinative the evidence as to whether Muscare's facial hair actually did or did not interfere with his effective personal use of a gas mask. The court declared (App. 148):

> "What we have before us is the validity of a regulation and its reasonableness generally. And the question of whether it is reasonable in terms of the individual context, which was raised here, I don't think is relevant."

The safety reason for the regulation, which the department advanced in its justification, the court found adequate to sustain the regulation's constitutionality—whether or not safety was the basic reason for the adoption of the regulation. The district court concluded that the regulation is merely minor abridgement of personal

liberty, which is justified by safety requirements (App. 149).

The court expressly refrained from assessing the substantiality of the public image and the paramilitary discipline rationales the department also urged.

Nor did the district court rule on the question of whether the department's suspension procedure provided due process. That issue was raised in the complaint (App. 7). But the plaintiff offered no evidence in support of that contention and did not urge that issue at the trial.

However, in a motion, filed March 26, 1975, for reconsideration or amendment of the judgment (App. 144, 145), Muscare argued that "even where the state can reasonably assert that a legislative regulation accurately applies to most people falling into a classification, when a case-by-case determination is available, the due process clause requires such an individualized determination" (App. 141-143). Averring (App. 143) that "[s]uch a test is not merely available; it is currently in use," counsel for plaintiff contended that "where, as here, the general rule invades a fundamental constitutional right, such a general regulation is unconstitutional."

The motion also maintained (App. 144) that Muscare had been denied due process, on the basis of his unsubstantiated assertion that he had been "cut off from his job" "[w]ithout notice of the charges against him, without an opportunity to be heard in his own defense."

On March 29, 1974, the district court denied plaintiff's motion for reconsideration or amendment of its judgment (App. 153).

The Per Curiam Opinion Of the Seventh Circuit

The per curiam opinion of the Court of Appeals for the Seventh Circuit, filed May 21, 1975 [App. 158-166], refrained from attempting to resolve the question of the constitutionality of the fire department's regulation of the facial hair of firemen, on the ground that it found Muscare had been "suspended without procedural due process" (App. 160).

The court of appeals reached this result despite its findings (App. 161) that Muscare's superior officer, Chief Morgan, had in December, 1973, "warned him that he would not be permitted to continue working as a firefighter unless he shaved off his beard" and that, a few days thereafter, Muscare "was informed that charges had been filed against him with the administrative authorities." The opinion also found (App. 161) that two and a half months elapsed after that before Muscare was suspended.

Also disallowed in the opinion was the constitutional adequacy of the provision in Illinois Revised Statutes, 1973, ch. 24, par. 10-1-18, for a post-conviction hearing before the civil service commission concerning the propriety of the suspension, available in cases of suspensions of more than 5 days—a right Muscare had failed to exercise.

The court of appeals ruled that "post-suspension review is insufficient," although it specifically admitted (App. 162) that the Illinois Supreme Court had recently held to the contrary in *Kropel v. Conlisk*, 60 Ill. 2d 17 (decided January 30, 1975).

The per curiam opinion of the court of appeals stated (App. 163) that it considered the decision of this Court in *Goss v. Lopez*, 419 U.S. 565 (decided January 22, 1975),

determinative in resolving the instant case. Recognizing that Muscare had a protected property interest in his employment, the court of appeals saw fit to apply the rationale of *Goss* in the following terms (App. 163):

> "In the circumstances of America's high schools, the court thought that notice, an explanation of the evidence the authorities have, and an opportunity to present his side of the story were sufficient to protect the student, and we think that at least this much is required in the circumstances of a public employee's suspension."

In addition, the per curiam opinion (App. 164) found confirmation of its opinion in *Arnett v. Kennedy*, 416 U.S. 134 (1974).

However, the opinion did recognize (App. 165) that, in a wide variety of emergency situations, "where harm to the public is threatened, and the private interest is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing." But the court of appeals made no attempt to clarify in what sort of specific situations disciplinary action could be taken without a pre-suspension hearing.

The City's petition for rehearing, with suggestions for rehearing in banc, was duly filed on June 4, 1974, and denied on June 17, 1975 (App. 167, 168).

On June 25, 1975, Circuit Judge Stevens entered an order staying the mandate of the Seventh Circuit until July 24, 1975 (App. 168).

The petition for certiorari was filed on the latter date and granted on October 14, 1975 (App. 170).

SUMMARY OF THE ARGUMENT

Respondent Muscare is a firefighter employed by the Chicago Fire Department. That agency has a departmental rule forbidding its firefighters to wear beards. The reason for the rule is that beards interfere with the functioning of the safety masks firefighters are required to wear in emergencies.

Muscare admitted that he was well aware of the rule, that he had twice before during the preceding three years worn a beard in violation of the rule, and that he reluctantly had twice shaved it off on being warned by his superiors that he would be disciplined if he did not do so. But from October, 1973, until March, 1974, he wore a beard in violation of the rule for a third time and refused to remove it despite warnings that he would be disciplined because of it and that charges were being prepared against him. He contended that the rule was invalid because it violated his First Amendment right to determine his own appearance. As a result he was suspended for 29 days.

He did not exercise his right, provided by Illinois statute, to an administrative hearing, with recovery of back pay in the event he was vindicated. Instead, he filed this civil rights action.

In a hearing on Muscare's application for an injunction, the district court ruled that the fire department rule against beards was valid as a safety measure and denied both temporary and permanent injunctions.

On appeal, attention was focused on the issue of procedural due process. The court of appeals reversed the judgment below, ruling that Muscare had been

denied due process because he had not been accorded a hearing prior to being suspended. It disallowed the constitutional sufficiency of the administrative procedure provided by state statute in short suspensions, pursuant to which Muscare had been suspended.

Under the decisions of this Court, such broadside generalization and indiscriminate application with respect to due process, as the court of appeals has here indulged in, are improper. The essence of due process is fairness. Due process does not require any particular form of procedure. Due process is not a technical conception with a fixed content, unrelated to time, place and circumstance. In its ultimate analysis, due process is respect, enforced by law, for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization.

At most, Muscare's rights in his job are not more than property rights. Under the decisions of this Court, where only property rights are involved, due process does not require a hearing in advance of, and not merely after, action taken by a governmental agency. Delay in the determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied.

Muscare was disciplined not only for violating the facial hair rule, but for his open and contemptuous insubordination to his superior officers. Such disruptive behavior by an employee has an adverse effect on fire department discipline and efficiency. The governmental interest in being able to act expeditiously in such cases is substantial and should be upheld.

The opinion of the court of appeals is in conflict with the decisions of this Court in *Arnett v. Kennedy*, 416 U.S. 134 (1973), and *Goss v. Lopez*, U.S. (1975), and the ruling of the Illinois Supreme Court in *Kropel v. Conlisk*, 60 Ill. 2d 17 (1975).

The ruling of the district court, upholding the constitutionality of the facial hair regulation of the Chicago Fire Department is sound, in accord with the great weight of authority, and should be upheld. The City produced expert witnesses who testified to the need for such a rule as a safety measure to safeguard the efficient functioning of gas masks which firefighters must wear in emergencies. Muscare presented no expert testimony. He was corroborated by no other firemen. He did not even try to demonstrate in court that he personally could obtain a good seal on a gas mask while wearing a beard.

ARGUMENT

I.

DUE PROCESS DOES NOT REQUIRE PRE-SUSPENSION HEARINGS.

A.

The Opinion Of The Seventh Circuit Is Based On Its Misreading Of Two Recent Decisions Of This Court: *Arnett v. Kennedy* And *Goss v. Lopez*.

(1) The Seventh Circuit apparently believed that *Goss v. Lopez*, 419 U.S. 565 (1975), supported the result it desired to reach in this case. The per curiam opinion declares (520 F.2d 1212, at 1215; App. 163):

> "Though *Goss* is a 'school' case, it nevertheless points the way to our resolution of the present case."

In like manner, in denying the petition for rehearing, the court of appeals attributed its conclusion to *Goss* (520 F.2d at 1216), which it again interpreted as mandating a pre-suspension hearing.

Goss, however, actually stands for the proposition that a public school student cannot be suspended or expelled unless he is granted a hearing either before or promptly after suspension or expulsion. In so ruling the court was affirming a three-judge district court, which had held that the plaintiff students had been denied due process because they had been suspended without a hearing before or after. And Justice Powell, in dissenting, so understood the opinion of the majority in *Goss*, which he described in the following terms (419 U.S. at 585):

> "The court . . . justifies this unprecedented intrustion into the process of elementary and secondary education by identifying a new constitutional right: the right of a student not to be suspended for as much as a single day without notice and a due process hearing either before or promptly following the suspension."

Indeed, the majority opinion of Justice White in *Goss* recognized (419 U.S. at 577) that:

> ". . . [T]he interpretation and application of the Due Process Clause are intensely practical matters and . . . 'the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)."

Actually *Goss*, in the context of the school situation, came to a result closely paralleling the conclusion, in an employment context, of the Illinois Supreme Court in *Kropel v. Conlisk*, 60 Ill. 2d 17 (1975), which interpreted the Illinois statute as requiring a hearing, if the employee requests it, promptly after the suspension, in any case of the suspension of a civil service employee for 30 days or less, with the right to back pay and correction of his employment record, if the employee is vindicated.

2. The opinion of the court of appeals also endeavored to find this Court's disposition of *Arnett v. Kennedy*, 416 U.S. 134 (1974), confirmation of its own analysis of the due process question presented here. That effort was based on a misreading of *Arnett v. Kennedy*, with which the opinion of the Seventh Circuit is in direct conflict.

In *Arnett*, it will be recalled, a majority of five justices held that due process is satisfied by administrative procedures which provide for a post-removal hearing, with the right to reinstatement and back pay if the removal decision is later found to have been wrongful.

Kennedy, was a non-probationary federal civil service employee, who was dismissed from his position in the Office of Economic Opportunity for allegedly making recklessly false and defamatory statements about other employees of that agency. It is true that he was by federal statute afforded pre-suspension administrative procedures, including 30 days prior notice, access to the derogatory material against him, and the right to respond both orally and in writing. But Kennedy contended that due process required a trial-type hearing, including the right to counsel and to present witnesses in his own behalf, together with the right to cross-examine adverse witnesses. He brought a civil action for declaratory and injunctive relief to enforce his theory of due process. A three-judge district court in the Northern District of Illinois, in the jurisdiction of the Seventh Circuit, agreed with him.

This Court rejected Kennedy's contention and reversed the district court in a 5-4 decision. Of the five justices in the majority, a plurality of three—the Chief Justice and Justices Stewart and Rehnquist—were of the opinion that the employees' rights were limited to those afforded by the Lloyd-LaFollette Act of 1915 (5 U.S.C. § 7501), which expressly states "no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal." The plurality of three, speaking by Justice Rehnquist, felt that the Due Process Clause does not require any pre-removal procedure beyond that embodied in whatever statute created the expectancy of job retention.

This holding was in accord with *Board of Regents v. Roth*, 408 U.S. 564 (1972), which concerned, however, state, not federal, employment. It is of interest in the case at bar that Chief Justice Burger, in concurring in

Roth, cited his concurring opinion in *Perry v. Sinderman*, 408 U.S. 593 (1972), where he stated (at 603, 604), that in cases involving state employees, the point should be underscored that the relationship between a state institution and one of its employees is essentially a matter of state concern and state law, and that it is only when the state employee has employment rights under state law that he, then, in turn has a right guaranteed by the Fourteenth Amendment to some form of administrative hearing on the cause for curtailment of his employment rights.

In *Arnett*, two justices—Justices Blackmun and Powell—reached the same conclusion as the plurality "on the basis of different reasoning" (416 U.S. at 164). Balancing the property rights of the individual employees in their jobs against the interest of the government in having the discretion expeditiously to remove employees who hinder efficient operation, they held that the due process requirements of notice and hearing were satisfied by a post-removal evidentiary hearing, with reinstatement and back pay should the removal decision be proven to have been wrongful.

In rejecting the contention that due process requires a pre-removal hearing, Justice Powell observed (416 U.S. at 168):

> "Prolonged retention of a disruptive or other unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial."

In the case at bar, the Seventh Circuit apparently thought that the two concurring justices in *Arnett*—Justice Powell and Justice Blackmun—"concurred in the result *solely* because they believed that the statute's provision of notice and opportunity to be heard *prior* to discharge satisfied the minimal requirements of constitutional due process" (*Muscare v. Quinn*, 520 F.2d 1212, at 1216, fn. 4 (1975). (Emphasis supplied.) But Justice Powell's concurring opinion in *Arnett*, in addition to the language already quoted, concerning the need of the government to act expeditiously in removing an unsatisfactory employee, contains the following statement in footnote 4 (416 U.S. at 168):

> "[T]he fact that some federal agencies may have decided to hold evidentiary hearings cannot mean that such a procedure is constitutionally mandated. The Federal Government's general practice to the contrary argues that efficiency is in fact thought to be adversely affected by prior evidentiary hearings."

A sixth member of the Court, Justice White, was of the opinion that, while a property interest in public employment is created by statute, the requisites of due process are defined, not by statute, but by the Constitution. He was of the view that due process requires a hearing at some time before the discharge becomes final, but that this need not be a trial-type hearing and it need not occur before the discharge becomes effective. It is sufficient if there is some kind of a hearing at some time (416 U.S. at 178). However, Justice White concluded that Kennedy had been denied due process because the hearing officer was the person Kennedy was charged with having slandered. On the other hand, the concurring opinion considered due process not to require an impartial pre-removal hearing officer, for the reason

that "an impartial decision-maker is provided at the post-removal hearing where the employee's claims are finally resolved" (416 U.S. at 170, fn. 5).

Three justices—Douglas, Brennan and Marshall—wholly dissented, being of the opinion that due process requires a trial-type pre-discharge hearing.

Under *Arnett*, advance notice and the right of the employee to make an informal written presentation before discharge becomes effective do satisfy due process, but they are not constitutionally mandated. We submit that a careful reading of the several opinions in *Arnett* supports this interpretation. So does the very recent decision of this Court in *Boehning v. Indiana State Employees Assn., Inc.*, ... U.S. ....., 44 L.W. 3275 (decided November 11, 1975), in which this Court reversed the Seventh Circuit with the following comment:

> "Although the question of respondent's federal constitutional right to a hearing at some time in connection with a discharge for cause may already have been resolved in respondent's favor in *Perry v. Sinderman*, 408 U.S. 593 (1972), *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Arnett v. Kennedy*, 416 U.S. 134 (1973), the tenured employee's right to a pre-removal hearing has been determined by this Court only in the context of a statute providing notice and an opportunity to respond in writing before removal coupled with a full hearing after removal. See concurring opinion of Powell, J., *Arnett v. Kennedy, supra*, at 164, 170."

De facto however, respondent Muscare had at least as much notice and opportunity to state his case as the employee in *Arnett v. Kennedy*, which held that due process was there satisfied. Twice before, Muscare had

been directly ordered to bring himself into conformity with the departmental regulation of facial hair, and he had twice complied by shaving. The third time he stated his opinion that the rule was unconstitutional and deliberately refused to comply.

For several months before his suspension became effective, Muscare had full knowledge that charges against him were being prepared. He knew exactly on what conduct of his the charges were based. Despite this, he made no effort either to persuade his superiors of the justice of his cause or to bring himself into conformity with the regulation. Muscare was treated fairly; he was accorded due process.

B.

The Opinion Of The Seventh Circuit Is In Direct Conflict With The Ruling Of The Illinois Supreme Court in *Kropel v. Conlisk*, Which Is In Accord With The Decisions Of This Court.

The opinion of the court of appeals in the case at bar is in direct conflict with the opinion of the Illinois Supreme Court in *Kropel v. Conlisk*, 60 Ill. 2d 17 (1975), as the court of appeals itself recognized (520 F.2d at 1215; App. 162, 163).

In *Kropel* the Illinois Supreme Court authoritatively reviewed the state civil service statutory provisions relating to employee suspensions. The court was there directly concerned with Illinois Revised Statutes (1973) ch. 24, par. 10-1-18.1, which has to do solely with police officers in municipalities with populations of 500,000 or more (i.e. Chicago) and which by its terms permits Chicago police officers to be suspended for any period of 30 days or less without a hearing. On the other hand the

general statewide civil service statute (Illinois Revised Statutes (1973), ch. 24, par. 10-1-18) grants all civil service employees of Illinois municipalities, with the exception of Chicago police officers, suspended for 30 days or less but for more than five days, or twice or more within six months, the right to a post-suspension hearing, upon request, with the right to back pay, if vindicated.

The Illinois Supreme Court ruled that par. 10-1-18, the general civil service provision, established a statewide policy of granting all civil service employees of Illinois municipalities, if suspended for any period of 30 days or less, the right, upon request, to a post-suspension hearing, with the right to recover back pay, if vindicated, that this statewide policy extended to Chicago police officers, and that it satisfied due process.

In thus liberally construing these state statutes, the Illinois Supreme Court was exercising its constitutional power as the final interpreter of Illinois law. It did so expressly in order to safeguard the validity of the legislation in the light of both the state and federal constitutions (60 Ill. 2d at 19, 26). And in so holding the Illinois Supreme Court reached the same conclusion as that of the majority of the justices of this Court in *Arnett v. Kennedy*, 416 U.S. 134 (1974), who ruled that due process does not require a pre-discharge hearing (*a fortiori*, does not require a pre-suspension hearing).

Due process is amply safeguarded in short civil service suspensions by adherence to the rule of *Arnett v. Kennedy* and *Kropel v. Conlisk*.

Common sense suggests that most civil service suspensions are for short periods of time—most commonly, for but a few days or even only one day. Common sense suggests that most such suspensions are justified and

that, if mistakes occur, they will usually be corrected by informal means. Usually, indeed, the employee does not contest the fairness of the discipline and accepts the penalty without a hearing. Requiring the municipality affirmatively to establish the correctness of every invocation of managerial authority before meting out any suspension, no matter how brief, would place a burden on the municipality disruptive of government efficiency. It can be presumed that it was in view of these considerations that, in *Kropel*, the Illinois Supreme Court concluded (60 Ill. 2d at 36, 37):

> "It is clear from all the statutes and rules set forth above that a major difference between a suspension for less than 30 days and a suspension for more than 30 days is that the latter requires a hearing before the sentence can be imposed. In effect, the department has the duty to go into a hearing and prove its case for suspension of more than 30 days. In the former instance, the burden is on the employee to seek review and establish why the suspension is unwarranted."

C.

In Actual Fact, The Respondent Was Treated With Fairness, Which Is The Essence Of Due Process.

The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961).

It may well be that, from a management-employee relations point-of-view, a pre-suspension hearing is, in most instances, preferable to a post-suspension hearing, provided the governmental agency has the available resources. Even so, there are enough emergency situations, which require immediate action, to preclude

the feasibility of an ironclad rule enforcing a requirement of pre-suspension hearings in all cases. In any event, even if pre-suspension hearings are usually preferable, that does not make them a constitutional imperative.

As Chief Justice Warren declared in *Hannah v. Larche*, 363 U.S. 420, 442 (1960):

> " 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts . . . [A]s a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account."

The requirements imposed by the guarantee of due process are not technical, nor is any particular form of procedure required by it. *Inland Empire District Council, L.S.W.V. v. Mills*, 325 U.S. 697, at 710 (1945). Thus, this Court has held that procedural due process does not necessarily require an opportunity for oral argument of a question of law. *Federal Communications Commission v. WJR, the Goodwill Station, Inc.*, 337 U.S. 265 (1949). In some situations, the Court has deemed oral argument essential to a trial hearing. *Londoner v. City and County of Denver*, 210 U.S. 373 (1908). In other situations, the Court has ruled that oral argument may be dispensed with. *Morgan v. United States*, 298 U.S. 468, at 481 (1936). Under the decisions of this Court, procedural due process is "not a matter . . . for broadside generalization

and indiscriminate application." *Federal Communications Commission v. WJR*, 337 U.S. at 277.

In the case at bar the court of appeals has done just that. It has engaged in "broadside generalization and indiscriminate application." It has ruled in so many words that in the case of "[p]ublic employees facing temporary suspensions for less than 30 days . . . due process requires at a minimum that they be granted a hearing prior to suspension where they may be fully informed of the reasons for the proposed suspension and where they may challenge their sufficiency" (App. 164).

This broadside generalization is in contradiction of the principle laid down by this Court in *Bowles v. Willingham*, 321 U.S. 503, at 519, 520 (1944), where, speaking by Justice Douglas, it held that due process does not require that, when the legislature delegates a task to an administrative agency, it shall always provide for a hearing in advance of, and not merely after, any action taken by such agency. That ruling was essentially a reaffirmance of the rationale of *Phillips v. Commissioner of Internal Revenue*, 283 U.S. 589, at 596, 597 (1931), in which, speaking for a unanimous court, Justice Brandeis said:

> "Where only property rights are involved mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. *Springer v. United States*, 102 U.S. 586; *Scottish Union and National Insurance Co. v. Bowland*, 196 U.S. 611. Delay in the 255 Ct. 345 judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied."

In determining what is due process of law, regard must be had to substance, not to form. *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, at 235 (1897) (Harlan, J.). In actual fact, respondent Muscare was treated with fairness, which is the essence of due process. Indeed, his flouting of a fire department rule, well known to all Chicago firefighters, was dealt with in a spirit of forebearance and patience. Muscare's deficiencies as an employee, in this respect, had a history of some three years. He admitted that he was familiar with the departmental safety regulation governing facial hair and that he had read it at roll call (App. 125).

According to his own testimony, Muscare had violated that rule twice before and had twice acknowledged its meaning and force by grudgingly complying, only to violate it again. The third time his contemptuous defiance of the regulation and the orders of his superiors was open and unmistakable. A few days later he was informed that charges against him had been prepared and filed. That was in December, 1973, but, because of the serious illness of the superior officer in whose jurisdiction it lay to determine what disciplinary action, if any, should be taken against him, the charges were not acted upon until February 27, 1974 (App. 5).

The only actual issue in dispute was the constitutional validity of the departmental facial hair rule. But that could not be determined by an administrative hearing.

However, Muscare was disciplined not only for violating the facial hair rule, but also for refusing to carry out a direct lawful order of his superior officers (to shave off his beard), in contravention of Section 61.006 of the Rules and Regulations of the Chicago Fire

Department. That Muscare violated his superior's orders is not disputed; the only issue in dispute as to that is whether the orders were lawful.

It is also undisputed that, under Illinois law, Muscare had a statutory right to a post-suspension hearing, with the right to back-pay and correction of his employment record, in the event he was vindicated. And it is undisputed that he failed to exercise that statutory right.

The procedure followed was appropriate to the case and just to Muscare. He had every opportunity to defend his rights. Such fairness of procedure "[is] due process in the primary sense." *Brinkerhoff-Faris Trust and Savings Company v. Hall*, 281 U.S. 673, at 681 (1930). As Justice Frankfurter stated, in concurring in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, at 162, 163 (1958):

> " '[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does, in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process."

II.

THE RULING OF THE DISTRICT COURT, THAT LIMITING THE LENGTH OF A FIREMAN'S FACIAL HAIR ON SAFETY GROUNDS, IS CONSTITUTIONAL, SHOULD BE AFFIRMED BY THIS COURT.

The trial of this case in the district court related solely to the question of the validity of the fire department rule limiting the amount of facial hair that may be worn by a firefighter. The district judge upheld the constitutionality of the regulation as a reasonable safety measure. This disposed of the only issue that would have been in dispute if a pre-suspension administrative hearing had been held, the only issue that would have been in controversy if Muscare had exercised his statutory right to a post-suspension hearing.

But the court of appeals failed to reach the question of the validity of the facial hair regulation (App. 160), because it concluded that Muscare had been "suspended without procedural due process". In effect, then, the court of appeals vacated the judgment of the district court as to the constitutionality of the fire department rule, without disallowing the validity of the district court's findings and conclusion.

If this Court concludes that the court of appeals was in error in reversing the judgment of the district court on due process grounds, then it would appear that the judgment of the district court, upholding the validity of the rule, would thereby be reinstated.

There is no good reason why this case should be remanded to the court of appeals, so that it can address itself to the issue of the validity of the rule. If that were done, it can safely be predicted that the losing party

would seek certiorari in this Court. Such multiplication of proceedings is not in the interest of judicial economy.

The decision of the district court that the rule limiting the length of a fireman's facial hair is constitutional is in accord with the great weight of authority, as indeed is clear from the opinion of the court of appeals itself (520 F.2d 1213, fn. 2; App. 160), which cites *Stradley v. Andersen*, 478 F. 2d 188 (8th Cir., 1973), *Yarbrough v. City of Jacksonville*, 363 F. Supp. 1176 (M.D., Fla. 1973), *Akridge v. Barres*, 321 A. 2d 230 (N.J. 1974), *Hordowich v. Board of Police and Fire Commissioners of Melrose Park*, 18 Ill. App. 3d 20 (1974), *Michini v. Rizzo*, 379 F. Supp. 837 (E.D., Pa. 1974), *aff'd* 511 F. 2d 1394 (3rd Cir., 1975), and *Manco v. Town of Irvington*, 313 A. 2d 219 (N.J. 1973), *aff'd*, 313 A. 2d 204 (N.J. 1974), as upholding the validity of such rules.

The various courts of appeal are not in accord as to whether determination of one's own appearance is a right protected by the Constitution. See the summary in *Arnold v. Carpenter*, 459 F. 2d 939, at 941 (7th Cir., 1972), The Fifth, Sixth, Ninth and Tenth Circuits have held there is no such constitutional right. *Stevenson v. Board of Education*, 426 F. 2d 1154 (5th Cir., 1970), *cert. denied*, 400 U.S. 957; *Jackson v. Dorrier*, 424 F. 2d 213 (6th Cir., 1970), *cert. denied*, 400 U.S. 850; *King v. Saddleback*, 445 F. 2d 932, at 940 (9th Cir., 1971). On the other hand, the First, Fourth and Eighth Circuits have held that it is a right of constitutional dimension. *Richards v. Thurston*, 424 F. 2d 1281 (1st Cir., 1970); *Massie v. Henry*, 455 F. 2d 779 (4th Cir., 1972); and *Bishop v. Colaw*, 450 F. 2d 1069 (8th Cir., 1971).

The Seventh Circuit appears to have vacillated. In *Breen v. Kahl*, 419 F. 2d 1034 (7th Cir., 1969), *cert. denied*, 398 U.S. 937, it ruled that the right to determine one's own appearance is a right protected by the Constitution. But in *Miller v. School District Number 167*, 495 F. 2d 658 (7th Cir., 1974), the Seventh Circuit, by Circuit Judge Stevens, declared (at 668):

> "We therefore hold that even if the individual interest in one's appearance may be characterized as an interest in liberty, the denial of public employment because the employer considers the applicant's appearance inappropriate for the position in question, does not in and of itself represent a deprivation that is forbidden by the Due Process Clause."

But all the precedents, even those which most strongly affirm that the right to determine one's own appearance is of constitutional dimension, recognize that that right is subject to reasonable limitations in the interest of public safety. Thus, in *Dwen v. Barry*, 483 F. 2d 1126 (2nd Cir., 1973), the court said (at 1130):

> "We hold only that choice of personal appearance is an ingredient of an individual's personal liberty, and that any restriction on that right must be justified by a legitimate state interest reasonably related to the regulation."

For a definition of what constitutes "substantial justification", the Second Circuit in *Breen* drew upon *United States v. O'Brien*, 391 U.S. 367 at 377 (1968), which set the following criteria:

> ". . . [A] governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest."

The *O'Brien* criteria are met by a fire department regulation limiting the amount of facial hair that may be worn by uniformed and disciplined firefighters who must be able to wear gas masks. It furthers the important and substantial governmental interest in public safety, and the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of the governmental interest in public safety.

As the Court stated in *Michini v. Rizzo*, 379 F. Supp. 837, at 848 (Ed. P 2. 1974), *aff'd.* 511 F. 2d 1394 (3rd Cir., 1975), an action brought by discharged firemen to establish their right to choose their own hairstyles and personal appearance:

> ". . . [We] need not be detained by the dispute between the parties as to whether the right of plaintiffs to wear their hair as they choose is a so-called 'fundamental right' which can be overridden only by a compelling governmental interest' or whether it is a non-fundamental right which must defer to any regulation bearing a rational relationship to a legitimate governmental purpose."

The fire department hair regulation is sustainable under either theory. Safety is a compelling governmental interest. The right and duty of officials to achieve maximum safety is determinative. A less restrictive alternative which will reduce infringement of a constitutionally protected right will not do so. In *Michini v. Rizzo*, 379 F. Supp. at 851, 852, the court also observed:

> ". . . [F]irefighting is one of the most hazardous occupations in America. The hazards of firefighting are such that the issue of safety *vel non* is measured in terms of not just cuts or bruises or even broken limbs, but rather serious burns, asphyxiation, and life itself. Moreover, the safety factor concerns not only the individual fireman, but also his fellow firefighters and others who may be trapped in a burning building, for to the extent that a given fireman is hindered in the performance of his duties, the risk to others (and to property) is increased. Accordingly, we cannot measure safety in relative terms. The officials in charge of the Department have a right-and a duty- to seek to achieve *maximum* safety." (Emphasis supplied.)

Yarbrough v. City of Jacksonville, 363 F. Supp. 1176 (M.D., Fla., 1973), was closely similar in its facts to the case at bar—save that the plaintiff in *Yarbrough* put in a far stronger case than Muscare. It was an action by a discharged fireman, who was joined by a firemen's association. They challenged hair-cut regulations issued by the fire chief. The plaintiffs invoked the First, Fifth, Ninth, Tenth and Fourteenth Amendments. The challenged regulations were similar to those attacked here. They also provided that "[m]oustaches are permissible, provided they are neatly trimmed and non-eccentric. The moustache shall not extend beyond a line horizontal with the corner of the mouth." (at 1178) Sideburns could not exceed one inch in width and could not extend beyond the bottom of the ear lobe. As for beards, the Jacksonville regulation specified:

> "Members shall be clean shaven upon reporting for duty and shall remain clean shaven throughout their tour of duty. Beards, bushy sideburns, and eccentric hair styles are forbidden." (at 1178)

On the basis of conflicting testimony—several individual firemen contradicting the statements by fire department officials that beards, bushy sideburns and long hair tend to interfere with the seal of the gas mask, are prone to catch fire, and impair firefighting effectiveness and the safety of firefighters and the public—the court concluded (at 1179):

> "The crux of this discussion is simply that no conclusive determination can be made as to the effect of longer hair styles on the personal safety of firemen and this Court is unwilling to interfere with the reasonable conclusions of the responsible officers in the Fire Protection Division that there is a rational relationship between longer hair and personal safety of its firemen."

In *Yarbrough* the court found (at 1181) the cases involving student hair regulations inapposite, because of the responsibility assumed by firemen to protect the public. It recognized (at 1179) that the effectiveness of a fire department, like that of a police force, depends upon carrying out orders and that it is necessary to maintain discipline, as well as public respect. The court acknowledged that those officials who have passed their working lives in fire prevention and abatement possess far better empirical judgment of what is essential to achieve an efficient and disciplined fire fighting force "than the officers themselves, the public or the predilection of individual judges." (at 1182)

The grooming standards also make the identification of firemen easier. This insures that the public will be aware of fire department presence, that the commands of the firemen will be obeyed. The regulation furthers a substantial governmental interest, namely, the projection of an image that facilitates the effective functioning of the fire department. *Marshall v. District of Columbia*, ... F. Supp. ....., 43 L.W. 2418 (1975).

Muscare's assertion (App. 53) that New York and Boston have long hair and they are not concerned with the problem of tight face seals was unsupported by any citation of authority. As to New York, it is certainly incorrect. The New York City Fire Department's Health

and Safety Standards for Hair and Beards contain the following provisions:

> "Facial hair
>
> "Moustaches are permitted, but shall conform to the following: They must be neatly trimmed; they must not extend beyond the corners of the mouth; they must not extend beyond any portion of the upper lip.
>
> "Beards or goatees are not permitted.
>
> "All members shall be otherwise freshly shaven when reporting for duty."
>
> (Prentice-Hall Public Personnel Administration: Policies and Practices for Personnel, Vol. 2, No. 4, p. 5 (July 30, 1974).)

In the instant case the Chicago Fire Department presented extensive evidence in support of the reasonableness of the departmental rule. Acting Chief Fire Marshall Foley testified as to the use by firefighters of gas masks with self-contained breathing apparatus and as to the experience of the department that beards and other facial hair beyond certain limits are apt to interfere with sealing out the outside atmosphere and toxic fumes in the use of masks. This official view of the fire department was corroborated by the expert opinion of an instructor in the use of gas masks at the National Safety Council School.

An instructor at the Chicago Fire Academy stated that the only way to test the effectiveness of a gas mask on a particular individual is to have the individual wear it and try out its functioning. He testified that Muscare on two different days had failed and refused to do this while wearing his beard.

Muscare did not contradict that testimony. He merely asserted that in his (unverified) experience his goatee did not interfere with the seal of a gas mask on his face. Muscare offered no expert testimony on the subject whatsoever. His contentions were not supported by the testimony of any other firemen as to their experience. Muscare did not attempt to perform in court a demonstration that he could obtain and maintain a seal on a gas mask while wearing a beard and carrying on strenuous physical activities.

The District Judge correctly concluded (App. 148):

> "What we have before us is the validity of a regulation and its reasonableness generally. And the question of whether it is reasonable in terms of the individual context, which was raised here, I don't think is relevant . . .
>
> "After hearing the evidence and examining the exhibits, I find the justification of the Fire Department, that is, the requirement limiting facial hair for reasons of safety related to the fit of the face mask of self-contained breathing apparatus, is neither capricious nor arbitrary justification. It appears to be grounded in reason. And it also appears to involve a minor abridgement of personal liberty, which is justified by safety regulations."

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be reversed and the judgment of the district court should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-130

ROBERT J. QUINN, INDIVIDUALLY AND AS COMMISSIONER OF THE CHICAGO FIRE DEPARTMENT,

Petitioner,

vs.

FRANCIS MUSCARE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH JUDICIAL CIRCUIT

BRIEF FOR RESPONDENT

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IN THE

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OCTOBER TERM, 1975

No. 75-130

ROBERT J. QUINN, INDIVIDUALLY AND AS COMMISSIONER OF THE CHICAGO FIRE DEPARTMENT,

Petitioner,

vs.

FRANCIS MUSCARE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH JUDICIAL CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The citations to the opinions below are adequately set forth in the Petitioner's Brief.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petitioner's Brief.

QUESTIONS PRESENTED

Whether, absent an emergency, a permanent public employee may be summarily suspended from his job without pay for 29 days prior to any notice of the charges against him or opportunity for any hearing to challenge those charges.[1]

1. In his Brief, Petitioner requests this Court to review that aspect of the original District Court Order denying Respondent's challenge to the constitutionality of the Chicago Fire Department personal appearance regulation [Pet. Br., p. 3]. The Court of Appeals explicitly declined to rule on that aspect of the District Court Order, reversing the District Court solely on the grounds that Respondent's suspension violated his right to due process of law. In accord with well established principles of this Court, this Court will not pass on issues not considered by the Court of Appeals. *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U. S. 388, 91 S. Ct. 1999 (1971); *F. T. C.* v. *Travelers Health Ass'n.*, 362 U. S. 293, 80 S. Ct. 717 (1960); *Carroll* v. *United States*, 354 U. S. 394, 396, n. 2, 77 S. Ct. 1332 (1957); *Owens* v. *Union Pac. R. Co.*, 319 U. S. 715, 63 S. Ct. 1271 (1943). Accordingly, Respondent will not argue the issue to this Court. Assuming, *arguendo*, that this Court decides to consider the constitutionality of the appearance regulation, an additional question is presented: whether the District Court erred in refusing to rule that § 51.133 of the Rules and Regulations of the Chicago Fire Department prescribing "proper personal appearance" is unconstitutional on its face and as applied. On this question, Respondent adopts the response of Amicus Curiae, AFL/CIO.

CONSTITUTIONAL PROVISIONS, STATUTES AND ADMINISTRATIVE REGULATIONS INVOLVED

In addition to the constitutional provisions, statutes and administrative regulations cited by Petitioner, this case involves the following provisions:

Rules and Regulations of the Chicago Fire Department

Part VI. Offenses, Procedures and Penalties in Respect to Violations of the Rules and Regulations, Practices and Procedures of the Chicago Fire Department . . .

> Members or other employees who shall be found guilty of infractions of any of the Rules and Regulations, Practices and Procedures of the Fire Department, shall be subject to the penalties hereinafter enumerated.
>
> § 61.001: Conduct unbecoming a member or employee of the Chicago Fire Department.
>
> • • • • •
>
> PENALTIES
>
> Section 61.107. Disciplinary Action for Violations of the Rules and Regulations, Practices and Procedures of the Chicago Fire Department.
>
> 1. Reprimand.
>
> 2. Suspension from the Fire Department for a period not to exceed thirty days.
>
> 3. Orders to appear before the Civil Service Commission for a hearing. (Additional suspension periods could be given depending upon the decision of this Board).
>
> 4. Discharge from the service of the City.

Rules of the Chicago Civil Service Commission
Rule VI, Section 7 [2]

Section 7 This section shall be applicable to suspensions of all Civil Service employees except those in the Department of Police.

Section 7. A. Emergency Suspension. The employee shall be served with a notice of suspension with an express finding by the department head that the public safety or the good of the department, or both, require the immediate suspension of the employee.

No later than seven days after service of the notice of emergency suspension the Civil Service Commission shall review the order of the department head together with the reasons therefore and shall at that time preliminarily confirm or reverse such order. If the order is reversed the employee shall be reinstated and paid for any period under suspension as a result of the order. If the order is preliminarily affirmed the Civil Service Commission shall within 21 days of such affirmance afford the employee an opportunity to appear before the Commission, and to receive a hearing pursuant to the rules of the Commission.

If the Civil Service Commission, upon hearing, determines that the suspension was unwarranted, the Commission shall reinstate the employee and order that the employee be paid for any period under suspension as a result of the unwarranted order.

Section 7. B. Suspension of Not More Than Five Days, In the Absence of Emergency. Within 24 hours after service of a notice of suspension for not more than five days, in the absence

2. The Rules of the Chicago Civil Service Commission were amended to add this provision in August, 1975 after the decision of the Court of Appeals in this action. Pursuant to counsel's obligations as set forth in *Fusari* v. *Steinberg*, 413 U. S. 379, 95 S. Ct. 533 (1974), counsel call this Court's attention to the changes in Petitioner's procedures for suspensions of fewer than thirty days.

of emergency, the employee may request in writing that he be granted a hearing before an officer designated by the department head. No such suspension shall be effective for 24 hours after service of the notice of suspension.

If no request for hearing is made within 24 hours after receipt of the notice, such suspension shall become effective after 24 hours following service.

If a hearing is requested, and after reviewing the record of the hearing, the department head conforms to his initial decision, the department head shall notify the Civil Service Commission and the suspension shall become effective upon such notification; no suspension shall become effective until the department head so notifies the Civil Service Commission.

Section 7. C. Suspensions in Excess of Five Days, in the Absence of Emergency. Within 24 hours after service of a notice of suspension in excess of five days, in the absence of emergency, the employee may request a hearing before the Civil Service Commission by filing a written request with the Secretary of the Civil Service Commission; no such suspension shall be effective for 24 hours after service of the notice of suspension.

If no request for hearing is made within 24 hours after receipt of the notice, such suspension shall become effective after 24 hours following service.

If a hearing is requested and the Civil Service Commission affirms the decision of the department head, the suspension shall become effective immediately; no suspension shall take effect until so ordered by the Civil Service Commission.

Section 7. D. A copy of this section on suspension procedures shall be attached to every Notice of Suspension.

STATEMENT OF THE CASE

This case presents the question of whether a permanent, tenured public employee may be suspended from his job without pay for 29 days before he is given notice of his alleged offense and an opportunity to defend himself. On February 27, 1974, three administrators of the Chicago Fire Department entered the duty station where Lt. Francis Muscare, an officer with twenty years' service in the Department, was working at his job as a fire fighter and ordered him to turn in his equipment and leave the premises immediately; he was suspended from his job (A. 5).[3] Lt. Muscare was told nothing further than that he could expect to receive a letter about his suspension (A. 5).

Five days later, on March 4, 1974, Lt. Muscare did receive a letter from Walter R. Braun, Fire Department Chief of Personnel, informing him for the first time that he had been charged with violating the Rules and Regulations of the Chicago Fire Department, §§ 61.001, 61.006 and 51.133 (A. 12):

(1) § 61.001 of the Rules and Regulations of the Chicago Fire Department creates the offense of "conduct unbecoming a member or employee of the Chicago Fire Department" (A. 14).[4]

3. References to authorities cited in the printed Appendix shall hereinafter be referred to as "A. ....."

4. In his anxiety to characterize Lt. Muscare's suspension as attributable entirely to his possession of a goatee in violation of the personal appearance rule (Pet. Br., p. 31), Petitioner has neglected to mention that the letter of March 4 also accused Lt. Muscare of violating this section of the Rules and Regulations. Petitioner's Brief to this Court fails to reproduce § 61.001, which is reproduced in this Brief at p. 3. Both before the District Court and on appeal, Lt. Muscare challenged the enforcement of this vague prohibition (A. 7), which, as he testified, he had never heard explained in twenty years with the Fire Department (A. 128-129).

(2) § 61.006 creates the offense of "disobedience of orders" (A. 14).

(3) § 51.133 prescribes the "proper personal appearance" for the members of the Chicago Fire Department (A. 13).

The Braun letter also informed Lt. Muscare that his suspension was to last 29 days from its inception five days earlier (A. 12).

Since September 1973, Lt. Muscare had worn a small mustache and a goatee (A. 4, 10, 11). Approximately two and one-half months prior to the events of February 27, 1974, one of Lt. Muscare's superior officers, a Chief Morgan, had told him that he should shave his goatee and that he would be working under charges (A. 5).[5] Thereafter, on December 21, 1973, someone filed written charges against Lt. Muscare with Acting Chief Fire Marshal William F. Foley (A. 104, 110). However, Chief Foley determined that he would take no action against Lt. Muscare at that time, allegedly in the hope that Lt. Muscare would voluntarily shave his goatee (A. 134).[6] Chief Foley did not inform Lt. Muscare of either his decision or the reasons for it.

Several days later, Chief Foley became incapacitated by illness (A. 105). Although during the weeks of his absence, he was replaced by another officer (A. 108), Chief Foley did not instruct his substitute to take any action on the charges lodged against Lt. Muscare in December (A. 109). The written charges against Lt. Muscare were allowed simply to lie on Chief Foley's desk (A. 108-109).

5. According to the Fire Department procedures, Chief Morgan was not empowered to make decisions regarding discipline of Lt. Muscare. He could only lodge charges against Lt. Muscare with a higher ranking administrator, ordinarily William F. Foley, Acting Chief Fire Marshal of the Chicago Fire Department (A. 108).

By Chief Foley's own testimony, only he or someone in his position can make the decision to suspend an employee in Lt. Muscare's position (A. 108).

6. During encounters with the administration over the issue of his goatees in prior years, no disciplinary action had been taken against Lt. Muscare, and the matter had been resolved informally (A. 123-125).

Chief Foley returned to work about February 10 (A. 105). Sometime during the next seventeen days, Chief Foley abandoned his December decision and determined to impose "firm" discipline against Lt. Muscare.[7] Thereupon, he dispatched the three deputies to Lt. Muscare's post (A. 133). Thus, two and one-half months elapsed from Chief Morgan's remark to Muscare in December until the Department acted, during which time Lt. Muscare was routinely working at his job. When Chief Foley changed his December decision and determined to suspend Muscare for 29 days, he did so without having communicated with Lt. Muscare at all (A. 110-111).

As Petitioner acknowledged at trial, the choice of a 29-day suspension ensured that Lt. Muscare would be punished for the longest period which did not require prior notice and hearing (A. 134-135).[8] Although Lt. Muscare was entitled to request a review of the 29-day suspension after it was imposed,[9] the Braun letter, Lt. Muscare's first and only notice of the length of his suspension and the alleged reasons therefor, does not mention his right to a post-suspension review (A. 12).

Upon receipt of the Braun letter, Lt. Muscare filed this action pursuant to 42 U. S. C. § 1983 challenging the constitutionality of the Fire Department's actions against him,[10] requesting declaratory and injunctive relief and damages (A.

7. According to Chief Foley, one reason for the severity of the discipline he imposed was his understanding of Lt. Muscare's prior encounters with the administration of the Fire Department (A. 133-134). The record indicates that Chief Foley played no role in any of these prior encounters (A. 122-125).

8. Pursuant to Illinois law, a permanent civil servant may not be suspended for more than 30 days without notice and a hearing prior to the suspension. *Ill. Rev. Stat.*, Ch. 24, § 10-1-18.

9. Under Illinois law, the subject of a suspension of 5 to 30 days may request a review of the propriety of the punishment at an unspecified time after the suspension is imposed. *Ill. Rev. Stat.*, Ch. 24, § 10-1-18.

10. From the outset of this litigation, one of Lt. Muscare's challenges was specifically directed to the constitutionality of the suspension procedures at issue herein (A. 7-8).

8-9). After a hearing on Respondent's request for a preliminary injunction, District Court Judge McGarr ruled that Petitioner's suspension of Lt. Muscare was constitutional.[11] Lt. Muscare filed a Motion for Reconsideration of Judgment, requesting that the Court specify that it was also denying Lt. Muscare's constitutional challenge to the procedures used to suspend him from his job (A. 138-139; 144-145; 151-152). Following the Court's denial of the Motion for Reconsideration, Lt. Muscare appealed to the United States Court of Appeals for the Seventh Circuit (A. 154).

The Court of Appeals reversed the District Court (A. 158-166). Noting that Lt. Muscare was suspended two and one-half months after Chief Morgan's remarks, the Court concluded that he had no meaningful notice of the three charges against him and no opportunity to answer them before he was disciplined and held that these infirmities violated Lt. Muscare's constitutional rights to due process (A. 161-164). The Court of Appeals specifically referred to this Court's recent decision in *Goss* v. *Lopez*, 419 U. S. 565, 95 S. Ct. 729 (1975), where this Court held that students in public schools are entitled to some measure of due process of law before they are suspended for even ten days. Reasoning that *Goss* indicated the proper resolution of Lt. Muscare's case, the Court determined that a permanent public employee has interests more deserving of protection under the due process clause than the students' interests which were the subject of *Goss* (A. 164). The Court ruled:

> It can hardly be disputed that appellant, as a twenty year veteran of the civil service, has a protected property interest in his employment, for "a state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment

11. At trial, Petitioner defended the constitutionality of the personal appearance rule (§ 51.133) on the grounds that it was a measure necessary to ensure safe use of the self-contained breathing apparatus (A. 51-136).

absent sufficient cause for discharge may demand the procedural protections of due process." 95 S. Ct. at 735. Nor can it be disputed that appellant's suspension for 29 days is not *de minimis*, and the "Court's view has been that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause." 95 S. Ct. at 737. It remains to answer the question what process is due, for in each situation the requirement is a flexible one.

As the Court has stated before and reaffirmed in *Goss*, "many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 313 (1950). In the circumstances of America's high schools, the Court thought that notice, an explanation of the evidence the authorities have, and an opportunity to present his side of the story were sufficient to protect the student, and we think that at least this much is required in the circumstances of a public employee's suspension. Not only are alleged transgressions justifying suspension often more serious than school discipline problems, but the corresponding penalties are potentially more damaging, for reputations, careers, and substantial amounts of lost pay are at stake.

Public employees facing temporary suspension for less than 30 days have interests qualifying for protection under the Due Process Clause, and due process requires at the minimum that they be granted a hearing prior to suspension where they may be fully informed of the reasons for the proposed suspension and where they may challenge their sufficiency. Whether such persons should be granted the full panoply of rights envisioned in Ill. Rev. Stat., Ch. 24, § 10-1-18, for suspensions greater than 30 days is a question which we need not now address, since no hearing of any kind was accorded appellant prior to his suspension. (A. 163-164)

The Petition for Certiorari to this Court followed.

SUMMARY OF ARGUMENT

This case involves the suspension of a permanent public employee from his job with no notice or opportunity for a hearing prior to the action against him.

I. Respondent in this action, Lt. Francis Muscare, enjoys a property interest in his employment which protects him against being suspended for 29 days without due process of law.

II. Based on *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 92 S. Ct. 2701 (1972), under *Goss* v. *Lopez*, *supra*, and the opinions of a majority of this Court in *Arnett* v. *Kennedy*, 416 U. S. 134, 94 S. Ct. 1633 (1974), before a permanent public employee may be suspended, due process requires that he be provided with notice of the charges against him and a reasonable opportunity to respond to those charges. In *Arnett*, a majority of this Court agreed that the due process clause requires protective procedures before a public employee may be deprived of his employment. In *Goss*, this Court analogized school children to public employees and ruled that, in the absence of prior procedures, school children could not be suspended for even ten days. This case presents that instance in which it was the public employee who was suspended without any prior procedures. Thus, this Court's opinions in *Goss* and *Arnett* necessitate affirmance of the opinion of the Court of Appeals that, absent an emergency, before a public employee may be suspended from his job, some prior procedures are required.

III. Neither Petitioner's conduct in this case nor the opportunity for limited later review of the suspension meet the minimal requirements of notice and an opportunity for a hearing required under the due process clause.

ARGUMENT

THE SUSPENSION OF LT. MUSCARE BY THE CHICAGO FIRE DEPARTMENT VIOLATED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW

I.

A Permanent Public Employee May Not Be Suspended from His Public Employment Without Due Process of Law

Since 1955, Respondent Lt. Francis Muscare has been employed as a fire fighter with the Fire Department of the City of Chicago (A. 5). As a Chicago fire fighter, Lt. Muscare enjoys the status of a permanent, tenured civil servant. Ill. Rev. Stat., Ch. 24, § 10-1-18.[12] It is now well settled that such a

12. Section 10-1-18 provides in part:

10-1-18. Removal—Suspension—Retirement] § 10-1-18. Except as hereinafter provided in this section, no officer or employee in the classified civil service of any municipality who is appointed under the rules and after examination, may be removed or discharged, or suspended for a period of more than 30 days, except for cause upon written charges and after an opportunity to be heard in his own defense. Such charges shall be investigated by or before the civil service commission, or by or before some officer or board appointed by the commission to conduct that investigation. The finding and decision of that commission or investigating officer or board, when approved by the commission, shall be certified to the appointing officer, and shall forthwith be enforced by that officer. Before any officer or employee in the classified service of any municipality may be interrogated or examined by or before any disciplinary board, or departmental agent or investigator, the results of which hearing, interrogation or examination may be the basis for filing charges seeking his removal or discharge, he must be advised in writing as to what specific improper or illegal act he is alleged to have committed; he must be advised in writing that his admissions made in the course of the hearing, interrogation or examination may be used as the basis for charges seeking his removal or discharge; and he must be advised in writing

(Continued on next page)

permanent, tenured civil servant possesses a property interest which cannot be taken from him without meeting the constitutional requirements of due process of law. *Arnett, supra,* 416 U. S., at 164 (Powell, J., concurring); at 171 (White, J., concurring and dissenting); at 206 (Marshall J., dissenting); *Board of Regents of State Colleges* v. *Roth, supra,*[13] *Perry* v. *Sindermann,* 408 U. S. 593, 92 S. Ct. 2694 (1972); *Connell* v. *Higgin-*

(Continued from preceding page)

that he has the right to counsel of his own choosing present to advise him at any hearing, interrogation or examination; and a complete record of any hearing, interrogation or examination shall be made and a complete transcript thereof made available to such officer or employee without delay. Nothing in this Division 1 limits the power of any officer to suspend a subordinate for a reasonable period, not exceeding 30 days except that any employee or officer suspended for more than 5 days or suspended within 6 months after a previous suspension shall be entitled, upon request, to a hearing before the civil service commission, concerning the propriety of such suspension. . . .

In order to obtain the protected status of a permanent civil servant, under § 10-1-18, candidates for such positions must meet a series of statutory requirements, including examination for the position (Ch. 24, § 10-1-7), selection from a register of eligible candidates (Ch. 24, § 10-1-12), and, in the case of a fire fighter, the completion of a course of instruction at the Fire Academy (Rules and Regulations of the Chicago Fire Department § 21.413 and § 51.117). Before promotion to the rank of lieutenant, the candidate must serve first in the lower rank of fire fighter and pass a promotional examination (Ch. 24, § 10-1-13). Only after fulfilling all of these requirements does a person become entitled to occupy the Civil Service position of lieutenant with the Chicago Fire Department.

Ch. 24, § 10-1-18 was recently construed by the Illinois Supreme Court in *Kropel* v. *Conlisk,* 60 Ill. 2d 17, 322 N. E. 2d 793 (1975). In sustaining an analogous provision of Illinois law governing the Chicago Police Department (Ch. 24, § 10-1-18.1), the Illinois Supreme Court ruled that § 10-1-18 provides only post-suspension review hearings in suspensions of 5 to 30 days and that such post-suspension hearings satisfy the requirements of the due process clause.

13. Lt. Muscare's career as a public employee is precisely the kind of property recognized as protected in *Roth.* Twenty years ago, Lt. Muscare successfully fulfilled the requirements of a merit civil service system. Since that time, he made his living and his career as a permanent employee of the Chicago Fire Department. Over these years, his expectation of continued employment as a fire-fighter became his property—a property as valuable to him as "real estate, chattels or money." *Roth, supra,* 408 U. S., at 571-572.

botham, 403 U. S. 207, 91 S. Ct. 1772 (1971); *Slochower* v. *Board of Higher Education of the City of New York*, 350 U. S. 551, 76 S. Ct. 637 (1956); *Wieman* v. *Updegraff*, 344 U. S. 183, 73 S. Ct. 215 (1952).[14] In *Goss, supra*, this Court ruled that the due process clause protects such a property interest from suspension.[15] So, too, Lt. Muscare possesses an interest protected against summary suspension by the due process clause.

This case is even more compelling than *Goss*. In *Goss*, under the Ohio statute establishing the school system, the principal enjoyed an unreviewable right to suspend a student for fewer than ten days without any statutory requirement of just cause. 419 U. S., at 573. Here, however, any suspension of a public employee for longer than five days must meet a statutory standard of "propriety." *Ill. Rev. Stat.*, Ch. 24, § 10-1-18. Petitioner's statement that "Under Illinois law [in suspensions of over five days] Muscare had a statutory right to back pay and correction of his employment record, in the event he was

14. Outside the area of public employment, this Court has repeatedly prohibited the state from interfering with a variety of other comparable property interests, absent prior procedures which comport with due process. *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601, 95 S. Ct. 719 (1975); *Goss, supra; Fuentes* v. *Shevin*, 407 U. S. 67, 92 S. Ct. 1983 (1972); *Bell* v. *Burson*, 402 U. S. 535, 91 S. Ct. 1586 (1971); *Goldberg* v. *Kelly*, 397 U. S. 254, 90 S. Ct. 1011 (1970); *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337, 89 S. Ct. 1820 (1969).

15. Analogizing the students' rights in *Goss* to those of public employees, this Court ruled that once a statute creates an over-all interest in public education, the protected interest may not be suspended in a manner violative of the Due Process Clause:

> It is true that § 3313.66 of the code permits school principals to suspend students for up to two weeks; but suspensions may not be imposed without any grounds whatsoever. All of the schools had their own rules specifying the grounds for expulsion or suspension. Having chosen to extend the right to an education to people of appellee's class generally, Ohio may not withdraw that right on the grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct has occurred. *Goss, supra*, 419 U. S., at 573-574.

vindicated" (Pet. Br., p. 32), concedes the existence of Muscare's property interest in this case.[16]

In addition, the Rules and Regulations of the Fire Department provide that Lt. Muscare's suspension could not have been imposed without cause. Under the Rules, the Department provides an elaborate list of specific causes to support a whole range of penalties. Rules and Regulations of the Chicago Fire Department, Part VI. The Fire Department does not distinguish between causes for penalties of fewer than thirty days and causes for penalties of greater length. The list of offenses in the Fire Department Rules expose the offender to the list of potential penalties from reprimand to discharge, and no one in this case contends that Lt. Muscare or any other fire fighter may be suspended for any length of time arbitrarily or for causes not specified in the Rules. Thus, Lt. Muscare's property right in his employment is protected against a suspension of fewer than thirty days. Where, as here, protected property rights are involved, Lt. Muscare's right to a fair procedure before he is deprived of his property is a matter of "constitutional guarantee." *Arnett, supra*, 416 U. S., at 167 (Powell, J., concurring).

II.

The Court of Appeals Correctly Ruled That Lt. Muscare Had a Right to Notice and a Hearing Before His Suspension

Reversing the judgment of the District Court in this case, the Court of Appeals found that: "No hearing of any kind was accorded Appellant before his suspension" (A. 164). Under these circumstances, unless an emergency is involved,[17] the Court

16. In *Kropel, supra*, the Illinois Supreme Court has also ruled that a tenured public employee is protected under this provision of Illinois law against "unwarranted" suspensions of fewer than thirty days. 60 Ill. 2d, at 27.

17. The Court of Appeals excluded from its ruling the:

> ". . . 'wide variety of situations [in which] it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action

(Continued on next page)

ruled, a permanent public employee may not be separated from his employment with no prior procedures of any kind. By so ruling, the Court of Appeals has required the Petitioner to conform to the standards set forth by this Court in *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 313, 70 S. Ct. 652 (1950):

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

In recent years, this Court has reiterated and elaborated on this commitment to the principle that some measure of due process must precede the imposition of a deprivation. *Goss, supra; North Georgia Finishing Co., supra; Arnett, supra; Fuentes, supra; Roth, supra; Boddie* v. *Connecticut*, 401 U. S. 371, 91 S. Ct. 780 (1971); *Bell, supra; Goldberg, supra; Sniadach, supra; cf. Gerstein* v. *Pugh*, 420 U. S. 103, 95 S. Ct. 854 (1975); *Wolff* v. *McDonnell*, 418 U. S. 539, 94 S. Ct. 2963 (1973); *Morrissey* v. *Brewer*, 408 U. S. 471, 92 S. Ct. 2593

(Continued from preceding page)

> pending a later hearing' R. A. Holman & Co. v. SEC, 299 F. 2d 127, 131 (D. C. Cir.) cert. den. 370 U. S. 911 (1962)."

In this case, however, the Court concluded:

> "Here, we perceive no such justification for avoiding the requirement of a pre-suspension hearing . . . there is merit to appellants' comment . . . that the present case hardly presents an emergency requiring the Fire Department to act without any prior process, where the Fire Department utilized the service of Lt. Muscare for a period of over two months from the time in December of 1973 when he was initially reprimanded for wearing a goatee to the time he was suspended on February 27, 1974." [A. 165]

As noted, *supra*, pp. 4-5, after the ruling of the Court of Appeals in this action, the City of Chicago amended its Regulations governing the suspension of permanent civil servants to provide for pre-suspension hearings, except in emergencies. Such regulations have been in force since August 1975. To date, the business of the City has proceeded without visible disruption.

(1972). Throughout these cases, which range from access to the judicial process, *Boddie, supra,* to the continued possession of a stove, *Fuentes, supra,* this Court repeatedly ruled that notice and the opportunity for a civil hearing must be offered prior to the taking.

Ruling in *Sniadach, supra,* 395 U. S., at 339, 342, to invalidate the Wisconsin pre-judgment garnishment statute, the Court specifically rejected a later hearing as inadequate:

> . . . wages are frozen (footnote omitted). [Wages] may, it is true, be unfrozen if the trial of the main suit is ever had and the wage earner wins on the merits. But in the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have, whether it be fraud or otherwise.
>
> * * * * *
>
> Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing (cf. *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 423, 35 S. Ct. 625, 628, 59 L. Ed. 1027) this prejudgment garnishment procedure violates the fundamental principles of due process.

In *Roth, supra,* 408 U. S., at 569-570, this Court was confronted, as here, with the question of the proper procedure for termination of a public employee. Speaking to the very issue of the timing of the requisite notice and hearing, this Court said:

> When protected interests are implicated, the right to some kind of *prior* hearing is paramount. (emphasis in original.)

Arnett, supra, was decided in the context of a statute providing protective proceedings for the employee thirty days prior to discharge.[18] Concurring to make a majority in *Arnett,* 416 U. S.,

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18. Petitioner's contention that this Court's denial of a full blown predischarge trial in *Arnett* supports the arbitrary actions against Muscare (Pet. Br., pp. 21-26), simply ignores the opinions of a majority of this Court in that case. (416 U. S., at 164, 171, 206).

at 170-171, two of the five members of this Court specifically noted that:

> . . . the affected employee is provided with 30 days advance written notice of the reasons for his proposed discharge and the material on which his notice is based. He is accorded the right to respond to the charges both orally and in writing, including the submission of affidavits. Upon request, he is entitled to appear personally before the official having the authority to make or recommend the final decision. Although an evidentiary hearing is not held, the employee may make any representations he believes relevant to this case . . .
>
> The present statute and regulations comport with due process by providing a reasonable *accommodation* of the competing interests. (Concurring opinion of Powell, J., joined by Blackmum, J.; emphasis added.)

Nonetheless, Mr. Justice White dissented from the Court's opinion on the grounds that the procedures preceding a discharge were not adequately protective in that case, and three other Justices dissented entirely, opining that a full trial is required before a discharge.[19]

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19. See also, *Boehning* v. *Indiana State Employees Association, Inc.*, No. 75-1544, 44 U. S. L. W. 3275, where this Court recently indicated that the pre-termination protections available by statute were essential to its determination in *Arnett:*

> . . . the tenured employee's right to a pre-removal hearing has been determined by this Court only in the context of a statute providing notice and an opportunity to respond in writing before removal coupled with a full hearing after removal. See concurring opinion of Powell, J., Arnett v. Kennedy, supra, at 164, 170.

In the instant case, the State statute does not provide any such "full hearing." The law contains no provision requiring prompt later procedures even in a post-suspension review. Moreover, in *Kropel, supra,* the Illinois Supreme Court recently ruled that, in the post-suspension hearing, the employee must bear the burden of establishing why the suspension is unwarranted. 60 Ill. 2d, at 27. In the instant case, the unfairness of requiring Lt. Muscare to prove his innocence under *Kropel* is further exacerbated by the abbreviated notice form, containing nothing but references to Rule numbers with none of the underlying facts revealed. *See, infra,* n. 25 at p. 21.

In *Goss, supra,* this Court ruled that a child in school cannot be summarily severed from his daily business until *after* he has a chance to speak on his own behalf: ". . . as a general rule notice and hearing should precede removal of the student from school." 419 U. S., at 582.[20] In the instant case, the Court of Appeals ruled that the right to timely procedures also protects this adult breadwinner. This Court has similarly ruled that where, as here, the State acts to deprive an adult of his living proper procedures are required prior to the taking. *Bell, supra; Goldberg, supra; Sniadach, supra; cf. Gerstein, supra,* 420 U. S., at 114. Concurring in *North Georgia Finishing, Inc.*, Mr. Justice Powell reiterated that, under *Sniadach,* the most protective of procedures pertains where a person's living is at issue.[21] Even while dissenting from this Court's opinion in *Goss,* Mr. Justice Powell acknowledged that the policy considerations which led him to dissent are largely absent in the case of an

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20. Petitioner erroneously contends that, under *Goss,* due process is satisfied even where a hearing is not granted until promptly after suspension or expulsion (Pet. Br., p. 20). Not surprisingly, Petitioner can find no language from the majority opinion in *Goss* to support this contention, and Petitioner's sole authority for his contention, a quotation from the dissenting opinion of Mr. Justice Powell [Pet. Br., pp. 20-21], is misplaced. In dissent, Mr. Justice Powell was characterizing the entire majority opinion, which includes a provision for delay of hearing only in an emergency. To quote the majority directly:

> Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable. 419 U. S., at 582-583.

Thus, Petitioner mistakenly attempts to apply authority directed solely at the emergency situation to this action, which has no such implications.

21. Mr. Justice Powell stated:

> The Court also cites *Sniadach* v. *Family Finance Corp.* [cite] which established an exception for garnishment of an individual's wages. In such cases, the due process clause requires notice and a hearing *prior* to application of the garnishment remedy. 419 U. S., at 611, n. 2 (Concurring opinion of Powell, J.).

employer and an employee.[22] Accordingly, the Court of Appeals for the Seventh Circuit properly noted the seriousness of the deprivation in this action:

> In the circumstances of America's high schools, the Court thought that notice, an explanation of the evidence the authorities have, and an opportunity to present his side of the story were sufficient to protect the student, and we think that at least this much is required in the circumstances of a public employee's suspension. Not only are alleged transgressions justifying suspension often more serious than school discipline problems, but the corresponding penalties are more damaging, for reputations, careers, and substantial amounts of lost pay are at stake (A. 163-164).

As the Court of Appeals found, with no prior notice or opportunity to defend himself, Lt. Muscare, an adult with twenty years service in his job, lost his entire paycheck for 29 days, a loss amounting to at least $1,400.00 (A. 164). Such a deprivation is prohibited by the due process clause and cannot be countenanced.

22. Mr. Justice Powell noted:

> In this regard, the relationship between a student and a teacher is manifestly different from that between a welfare administrator and a recipient (see Goldberg v. Kelly, *supra*), a motor vehicle department and a driver (see Bell v. Burson, *supra*), a debtor and a creditor (see Sniadach v. Family Finance Corp., *supra;* Fuentes v. Shevin, *supra;* Mitchell v. W. T. Grant, 416 U. S. 600, 94 S. Ct. 1805, 40 L.Ed. 406 (1974)), a parole officer and a parolee (see Morrissey v. Brewer, *supra*), or even an employer and an employee (see Arnett v. Kennedy, *supra*). In many of these non-education settings there is—for purposes of this analysis—a "faceless" administrator dealing with an equally "faceless" recipient of some form of government benefit or license; . . ." 419 U. S., at 594.

III.

The Fire Department's Actions in This Case Did Not Satisfy the Requirements of Due Process

A. Respondent Did Not Receive Adequate and Timely Notice

In its opinion in this case, the Court of Appeals found that Petitioner had provided Lt. Muscare with none of the procedures required by due process prior to depriving him of his employment. In his brief to this Court, Petitioner contends that his actions prior to suspending Lt. Muscare constituted "fairness, which is the essence of due process" (Pet. Br., p. 31). "Indeed," the Petitioner continues, "his [Lt. Muscare's] flouting of the Fire Department rule well known to all Chicago Fire Fighters, was dealt with in a spirit of forebearance and patience" (Pet. Br., p. 31).[23] Petitioner attempts to support this assertion on the grounds that approximately two and one-half months before the suspension, Chief Morgan, one of Respondent's superiors, said to Lt. Muscare to shave his goatee and that he was "working under charges" (Pet. Br., p. 31).

Morgan's conversation with Lt. Muscare did not approach the notice required by the due process clause.[24] First, Lt. Muscare was not told what the charges against him were. At most, Morgan's words alluded only to Petitioner's goatee, and Morgan did not even direct Lt. Muscare specifically to the Personal Appearance Rule. Morgan mentioned nothing about any other violation, yet Petitioner's letter of suspension detailed the section num-

23. Lt. Muscare was suspended for 29 days. Chief Foley, who selected the length of the suspension, acknowledged that he knew that any longer suspension would involve "going through the trial court" (A. 135) and that he knew that reference of the case to the Civil Service Commission would deprive the Fire Department of the summary power to determine Lt. Muscare's fate (A. 136).

24. Since Lt. Muscare was not apprised of either the nature of the charges against him, the facts supporting the charges or the potential action awaiting him, he could not have responded to an opportunity for a hearing in any meaningful way.

bers of two other Department Rules which Muscare is alleged to have violated. Accordingly, Lt. Muscare had no warning from Morgan that he would be suspended for, *inter alia*, "failure to obey orders" and "conduct unbecoming an employee or member of the Chicago Fire Department."

Further, Morgan said nothing to Lt. Muscare about the facts underlying any of the charges ultimately lodged against Lt. Muscare. Although Petitioner's entire case at trial rested on the alleged safety problems posed by Muscare's goatee, Morgan never mentioned safety to Muscare. It was not until the federal court trial that Chief Foley revealed to Lt. Muscare that, when he determined to suspend Lt. Muscare for 29 days, he thought that Lt. Muscare had deliberately disobeyed a direct order and that Lt. Muscare was responsible for other, earlier incidents.

Finally, Morgan told Lt. Muscare nothing about the consequences he was facing. Chief Morgan was not even authorized to decide what consequences to impose on Lt. Muscare, and Chief Foley testified that he had no intention of imposing any punishment on Lt. Muscare in December, at the time of Muscare's alleged "notice". Two and one-half months later, in February, when Foley changed his mind and decided to discipline Lt. Muscare consequent to the earlier "charges", Lt. Muscare was told nothing of the decision until it was implemented.[25]

In contrast to Petitioner's conduct herein, this Court has repeatedly ruled that:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Milliken v. Meyer, 311 U. S. 457, 61 S. Ct. 339, 85 L. Ed.

25. Even after implementation of the suspension, the Braun letter certainly cannot withstand constitutional scrutiny, since it also says nothing about the facts underlying the charged misconduct. As noted above, n. 19 at p. 18, under *Kropel*, Lt. Muscare would bear the burden of proving his innocence based on the wholly inadequate "notice" provided by Braun.

> 278, 132 A. L. R. 1357; Grannis v. Ordean, 234 U. S. 385, 34 S. Ct. 779, 58 L. Ed. 1363; Priest v. Board of Trustees of Town of Las Vegas, 232 U. S. 604, 34 S. Ct. 443, 58 L. Ed. 751; Roller v. Holly, 176 U. S. 398, 20 S. Ct. 410 44 L. Ed. 520. The Notice must be of such nature as reasonably to convey the required information, Grannis v. Ordean, supra, and it must afford a reasonable time for those interested to make their appearance, Roller v. Holly, supra, and cf. Goodrich v. Ferris, 214 U. S. 71, 29 S. Ct. 580, 53 L. Ed. 914. *Mullane, supra*, 339 U. S., at 314.

More recently, this Court succinctly held:

> Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must set forth the alleged misconduct with particularity. *Application of Gault*, 387 U. S. 1, 33, 87 S. Ct. 1428 (1967).

Accord, Goss, supra; Wolff, supra; Arnett, supra; Goldberg, supra; Armstrong v. *Manzo*, 380 U. S. 545, 85 S. Ct. 1187 (1965); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 71 S. Ct. 624 (1957) (concurring opinion of Mr. Justice Frankfurter).

In *Goss, supra*, this Court ruled that even in the context of school disorders the school must give the student notice of the alleged "defalcation," the "basis for the principal's belief he was involved," the "charges against him" and, if he denies the charges, "an explanation of the evidence the authorities have." *Goss, supra*, 419 U. S., at 581. In *Arnett, supra*, 416 U. S., at 170, the employee received thirty days advance notice of the "reasons for his proposed discharge and the materials on which the notice is based." In *Goldberg, supra*, 397 U. S., at 267, the Court ruled that where welfare benefits are to be terminated, the principles of due process "require . . . notice detailing the reasons for the proposed termination."

Plainly, Petitioner's conduct in this case does not approach the minimal notice required by due process.

B. Respondent Did Not Have an Opportunity for a Timely Hearing

As the Court of Appeals ruled, Lt. Muscare received no opportunity at all for a hearing prior to the action against him, in violation of his rights under the due process clause. Even in *Goss, supra,* where concerns of public policy weigh heavily on the side of abbreviated procedures, this Court ruled that, at minimum, the student must receive "an opportunity to present his side of the story." 419 U. S., at 581.[26]

In *Bell, supra,* 402 U. S., at 542, where the interest at stake was only a license to drive, this Court ruled:

> We hold, then, that under Georgia's present statutory scheme, before the State may deprive petitioner of his driver's license and vehicle registration it *must provide a forum* for the determination of the question whether there is a reasonable possibility of a judgment being rendered against him as a result of the accident. (emphasis added.)

Petitioner does not even assert that anyone made any effort to give Lt. Muscare a prior hearing. Morgan could not have given Lt. Muscare such a hearing, since a hearing which satisfies due process must be held before someone authorized to decide the issue (*Arnett, supra,* 416 U. S., at 170; *Goss, supra*), and Chief Foley, who was authorized to decide the issue, never saw the man.

In *post hoc* defense of his failure to provide such a hearing, Petitioner asserts that Lt. Muscare was not entitled to an opportunity for a hearing, because "The only actual issue in dispute was the constitutional validity of the departmental facial hair rule [which] could not be determined by an administrative hearing." (Pet. Br., p. 31). Plainly, the constitutional right to an opportunity for a hearing cannot rest on an administrator's

26. This Court observed:

> But it would be a strange disciplinary system in an educational institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his defalcation and to let him tell his side of the story in order to make sure that an injustice is not done. 419 U. S., at 580.

unilateral determination in advance of what might be in dispute should such a hearing take place. In February 1974, Chief Foley determined to charge Lt. Muscare with violations of three Fire Department Rules. Under the due process clause, Lt. Muscare was entitled to an opportunity to be heard on those alleged violations before he was deprived of his property rights. It is the opportunity for hearing which he claims, and Petitioner cannot now defend his failure to provide that opportunity by asserting that (now that Petitioner has had a chance to find out some of the facts involved at the federal trial on Respondent's challenge to his procedures) such a hearing would not have been useful.[27]

The instant case well illustrates why the Constitutional right to a hearing cannot depend on the administrator's prediction of what a hearing might reveal. In contending that a hearing is not required here, Petitioner asserts that Lt. Muscare could have made no factual defense. To the contrary, each of the three charges levied against Lt. Muscare raises a host of factual issues for which a hearing is indispensable.

Thus, regarding disobedience of orders, Chief Foley volunteered at trial that one reason for the severity of Lt. Muscare's punishment was that he hadn't "complied" with what Foley considered an order to shave. The most minimal of due process hearings would have revealed who ordered what and when, whether the order was clearly stated, and whether Lt. Muscare heard and understood the order. Petitioner cannot unilaterally dis-

27. In *Goss, supra, Gerstein, supra,* and *Sniadach, supra,* this Court ruled that the individuals involved were entitled to the opportunity for a hearing without regard to what it thought the hearing would ultimately have revealed. In *Goss,* one of the students summarily suspended was Rudolph Sutton, who, in the presence of the principal, physically attacked a police officer. 419 U. S., at 570. In *Gerstein, supra,* the plaintiffs, challenging their pretrial detention without a hearing on probable cause, were all convicted of the offenses by the time the case reached the Supreme Court. 420 U. S., at 110. In *Sniadach, supra.* the wage earner, challenging the garnishment proceedings, filed an affidavit in the state court proceedings which did not deny her indebtedness. 395 U. S., at 347.

pose of the requirement of a hearing on this issue by asserting, without even a citation to the record, "that Muscare violated his superior's order is not disputed." (Pet. Br., p. 31).

Regarding "Conduct unbecoming," even if Lt. Muscare knew in advance what types of conduct constituted a violation of this prohibition,[28] and even if he had proper notice of what unbecoming conduct was charged against him, he was at least entitled to an opportunity to be heard on the accusation. The charge of unbecoming conduct most vividly illustrates the need for a hearing to identify the behavior at issue before an adult is separated from his living.

Further, assuming, *arguendo,* that the only matter to be considered at a hearing was Lt. Muscare's compliance with the proper personal appearance rule, there are factual issues to be determined at a hearing in that regard. Petitioner contends that the personal appearance rule is justified by the Fire Department's concern for safety in use of the face mask. However, all witnesses at trial agreed that this face mask can be tested only by the individual involved, and Lt. Muscare testified without rebuttal that his face mask operated safely while he wore his goatee. Chief Foley never even asked to see Lt. Muscare, much less to witness a test of this particular equipment. Lt. Muscare has contended throughout this litigation that the Fire Department's considerations of safe use of the breathing apparatus do not support the personal appearance rule. Thus, a hearing would have enabled him to demonstrate that the rule is ill-suited to advance the interests of safety and should not be enforced against him.

Further, Petitioner asserts, without citation to any authority, that the Fire Department could not have recognized the constitutional infirmity of its own rules at a hearing prior to applying the rule to Lt. Muscare (Pet. Br., p. 31). To the contrary,

28. Lt. Muscare testified that in twenty years with the Fire Department, he had never been informed of what constitutes unbecoming conduct under § 61.001 of the Rules.

a state and its agencies have a duty to comply with the Constitution, *Georgia Power Co.* v. *City of Decatur,* 281 U. S. 505, 508; 50 S. Ct. 369 (1930), and, unlike a case challenging a statute or an ordinance, here no policy considerations prohibit the Department from considering a challenge to its own rule.[29]

Finally, Lt Muscare was entitled to an opportunity for a hearing to present evidence in mitigation of the prospective punishment. *Gagnon* v. *Scarpelli,* 411 U. S. 778, 790, 93 S. Ct. 1756 (1973); *Morrissey* v. *Brewer, supra; Cooke* v. *United States,* 267 U. S. 517, 538 (1925). As illustrated by the record in the trial on the constitutional issues alone, there were numerous facts relevant to mitigation at issue between the parties. For example, Chief Foley has admitted that he selected the longest summary suspension time for Lt. Muscare, partly because of his impression of prior incidents in which he had not even participated and partly to punish Lt. Muscare for what Foley viewed as deliberate insubordination. Lt. Muscare had no opportunity to explain or contest these assumptions. Further, the Department defended the appearance rule on grounds of an alleged safety hazard. Lt. Muscare, an experienced firefighter, denied that he posed any safety hazard. He testified without rebuttal that his mask operated safely at drill and on actual duty. Lt. Muscare was charged with unbecoming conduct. Had he been informed of his alleged transgression, he might have made some explanation. Thus, each dispute regarding the three charges against Lt. Muscare would also have been relevant to mitigate the severity of his punishment.

29. Indeed, Petitioner himself acknowledges that, had Lt. Muscare not sought his federal remedy, he could have disputed the constitutionality of the appearance regulation at an administrative hearing within the Fire Department, either before or after the suspension:

> "[The District Court ruling sustaining] the Constitutionality of the regulation . . . disposed of the only issue that would have been in dispute if a pre-suspension administrative hearing had been held, the only issue that would have been in controversy if Muscare had exercised his statutory right to a post-suspension hearing." (Pet. Br., p. 33.)

For all of these reasons, the denial of a hearing to Lt. Muscare before his suspension was imposed constituted a deprivation of due process, and Petitioner cannot now redeem his actions by denying the utility of this fundamental protection.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-130

ROBERT J. QUINN, individually and as Commissioner of the Chicago Fire Department,

Petitioner,

vs.

FRANCIS MUSCARE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-130

ROBERT J. QUINN, individually and as Commissioner of the Chicago Fire Department,

Petitioner,

vs.

FRANCIS MUSCARE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY BRIEF

ARGUMENT

I.

MUSCARE HAD A PRESUSPENSION HEARING.

EVEN UNDER HIS OWN THEORY THAT A PRESUSPENSION HEARING IS A REQUIREMENT OF CONSTITUTIONAL COMPULSION, MUSCARE WAS NOT DENIED DUE PROCESS.

As we have already stated in the reply brief we filed while our petition for certiorari was pending, respondent Muscare's statement of the case presents his

suspension without its background. His brief on the merits fails to correct the false impression created. By dramatizing only the last act, with no explanation of how the protagonist got into his predicament and found himself subject to discipline by his employer, Muscare endeavors to make it seem as though his superior officers suddenly, without warning, descended upon him and, without explanation, abruptly and arbitrarily threw him out of the fire station.

The amicus curiae brief presented by the Illinois Division of the American Civil Liberties Union (p. 4) follows tamely along in perpetuating that error.

Actually, according to Muscare's own testimony (App. 122-125), his dispute with the Chicago Fire Department as to his wearing of whiskers had a history of some three years. He had twice before violated the departmental safety regulation concerning facial hair and had twice acknowledged the force and purport of that regulation by grudgingly complying with it only to violate it again. His contemptuous defiance of the regulation and of the orders of his superiors, issued to him in enforcement of it, was open, unmistakable and, by its very nature, conspicuous and disruptive of discipline.

This is a due process case only by virtue of misstatement of the facts. Muscare does not dispute that he was wearing a goatee. The complaint he filed in instituting this action so states (App. 5, 6). Attached to the complaint, are Exhibits A and B, two photographs of Muscare, showing him wearing both a beard and a firehat (App. 20, 11). The complaint also sets forth the departmental regulation prohibiting the wearing of such facial hair (App. 6).

Muscare does not deny the applicability of the regulation to his beard. He does not deny that he was in violation of the regulation. He does not gainsay the authority of the fire department to issue and enforce rules governing its employees. What he claimed is that the regulation is unconstitutional, that it infringes upon his First Amendment right to determine his own appearance, and that the regulation is unnecessary to safety.

Muscare had three years notice of the department's recurring dissatisfaction with him. He presented his view of the matter to the department on several occasions—including a hearing before a departmental board consisting of two fire chiefs and an instructor at the Fire Academy (App. 123-125). Following the hearing, he complied with the board's directive to shave, then defied it by letting his beard grow again.

If Muscare's superiors are open to any criticism as to their handling of the matter, it is that they were too lenient with Muscare, probably because he was an employee with many years seniority. Muscare was openly violating a safety rule. This was properly an emergency matter. He should have been suspended much more promptly. But from the forebearance of his superiors, lengthened by the fortuitous circumstance of the serious illness of the superior with authority to suspend him, Muscare seeks to extract the argument that enforcement of the safety regulation was not an emergency matter.

The Court of Appeals has ignored these facts which are so plain in the record. Instead of viewing the evidence realistically, it has permitted itself to be persuaded by the generalizations of the respondent, based on an expurgated version of the events, and has concluded that "no hearing of any kind was accorded Appellant before his suspension" (App. 164).

II.

PRESUSPENSION HEARINGS FOR TENURED PUBLIC EMPLOYEES ARE NOT REQUIRED BY THE DUE PROCESS CLAUSE.

The respondent has failed to respond to our criticism (Petitioner's Brief, pp. 20-25) of the 7th Circuit's misapprehension of the purport of this Court's rulings in *Arnett v. Kennedy*, 416 U.S. 134 (1974), and *Goss v. Lopez*, 419 U.S. 565 (1975). By a species of confession by avoidance the respondent has merely repeated the errors (Respondent's Brief, pp. 17-20).

The amicus curiae brief filed by the Coalition of American Public Employees (p. 10) takes issue with our contention (Petitioner's Brief p. 21) that in *Arnett v. Kennedy* a majority of five members of this Court held that in civil service discharge cases due process is satisfied by a post-removal hearing. We were mistaken. Six members of the Court were of that opinion.

It is true that, as the C.A.P.E. amicus curiae brief (p. 14) states, in *Arnett* the issue was whether a full-trial type hearing was required. The statute governing Kennedy's rights as an employee provided for a pre-termination notice and hearing but expressly stated that such hearing was not to be a trial, except in the discretion of "the individual directing the removal or suspension." Kennedy claimed that due process required that his statutory pre-termination hearing be a trial.

Only three members of the Court—Justices Douglas, Brennan and Marshall—agreed with him. Of the others, three—the Chief Justice and Justices Stewart and Rehnquist—held that the employee had only those rights to notice and hearing that were granted to him by statute—nothing more. Two justices—Justices Blackmun and Powell—held that although the employee's rights

were created by statute, they were protected from deprivation by the Due Process Clause, but this would be satisfied by a post-termination hearing. Justice Powell observed that the Government's interest in acting expeditiously in discharge cases was substantial (416 U.S. at 168) and the general practice of most federal agencies indicates that "efficiency is in fact thought to be adversely affected by prior evidentiary hearings" (*idem.*). Justice White was of the opinion (416 U.S. at 178) that the hearing need not be a trial and that it should occur before the discharge becomes final, but not necessarily before it becomes effective.

It should be carefully noted that *Arnett v. Kennedy* is a discharge case, entailing a much more severe and stigmatizing penalty than even a 29 day suspension, the penalty in the case at bar. It should also be noted that the principle contended for by respondent—that a pre-suspension hearing is constitutionally required on every suspension of a tenured government employee—would, if sustained, be applicable even to a suspension of no more than one day.

In our principal brief (p. 25) we observed that the correctness of our reading of *Arnett v. Kennedy* has been confirmed by this Court's recent per curiam opinion in *Boehning v. Indiana State Employees Association, Inc.*, No. 74-1544, 44 LW 3275 (decided November 11, 1975). There the Seventh Circuit had found that the Indiana Administrative Adjudication Act, as yet unconstrued by the Indiana courts, contained nothing that would support a state civil service employee's claim for a pretermination hearing. The Seventh Circuit then, on federal constitutional grounds, resolved the employee's claim for a pretermination hearing in her favor. In reversing the Seventh Circuit, this Court found the Indiana statute

ambiguous and ruled that the federal courts should abstain from deciding the federal constitutional issue pending resolution of the state law question in the state courts. In a footnote, the per curiam opinion of this Court further stated:

> "The possibility that the Indiana State courts would adopt the construction contrary to that of the Seventh Circuit Court of Appeals is somewhat enhanced by the fact that the construction adopted by the Seventh Circuit may fairly be said to raise federal constitutional problems under recent procedural due process decisions of this Court, e.g. *Arnett v. Kennedy*, 416 U.S. 134, particularly if, as the Seventh Circuit appears to have assumed the Administrative Adjudication Act would leave respondent without a state law right to a hearing at any time in connection with her dismissal for cause
>
> . . .
>
> "Although the question of respondent's federal constitutional right to a hearing *at some time*, in connection with a discharge for cause may already have been resolved in respondent's favor in *Perry v. Sinderman*, 408 U.S. 593 (1972), *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Arnett v Kennedy*, 416 U.S. 134, the tenured employee's right to a preremoval hearing has been determined by this Court only in the context of a statute providing notice and an opportunity to respond in writing before removal, coupled with a full hearing after removal. See concurring opinion of Powell, J. *Arnett v. Kennedy*, supra at 164, 170." (Emphasis supplied.)

The plain meaning of those words is that a tenured public employee has a constitutional right to a hearing on his discharge for cause at some time either before or after the discharge, but that his claim to have a hearing before the discharge becomes effective is dependent

upon the existence of a statute granting him the right to a pretermination hearing. As Justice Powell remarked in *Arnett* (416 U.S. at 168 fn. 4):

> "[T]he fact that some federal agencies may have decided to hold evidentiary hearings cannot mean that such a procedure is constitutionally mandated. The Federal Government's general practice to the contrary argues that efficiency is in fact thought to be adversely affected by prior evidentiary hearings."

Respondent's contention (Respondent's Brief p. 18) that in *Arnett* the existence of a statutory pretermination procedure was essential to this Court's determination is not borne out by the text of the several opinions in this Court.

As for *Goss v. Lopez*, 419 U.S. 565 (1975), which the Seventh Circuit stated (520 F. 2d at 1215) "points the way to our resolution of the present case", respondent endeavors (Respondent's Brief, p. 19) to confirm the correctness of the Seventh Circuit's reliance on *Goss* by quoting the remark of the Court that, in the context of the school situation, "as a general rule notice and hearing should precede removal of the student from school" (419 U.S. at 582). Respondent fails to mention that in *Goss* this Court went on to say (*ibid.*) that "[s]tudents whose presence poses . . . an ongoing threat of disrupting the academic process may be immediately removed from school." Surely, respondent Muscare's open and recalcitrant flouting of departmental regulations posed an ongoing threat of disrupting the firefighting process, which requires discipline and the prompt carrying out of orders.

Palpable differences exist between schools and fire departments. Pupils are either children of tender years or immature teenagers. Firemen are adults who have

been especially trained in their demanding and hazardous occupation and are required to pass examinations before achieving tenure. The disciplinary officer of a school, who is usually the principal, is ordinarily present in the school building during school hours and the student can easily be brought before him. The commissioner or superintendent of a large metropolitan fire department commonly has a centrally located office, often miles away from the fire station where the particular fireman is employed and he has a multitude of other matters, many of them emergencies, competing for his attention.

The pupil in school has a statutory right to an education. Suspension for cause is a loss of that right. Even if it is later recognized that the suspension of a student was made in error, time lost from school cannot be made up without overtime study or delay in advancing to a higher grade.

The property right of a tenured public employee in his job is a property right of a peculiar sort. Unlike the right to real or personal property, the right to a job is not an exclusive right to possess, enjoy and dispose of as a particular thing. The right to a particular job is merely the right to continue working in return for pay. It is an interest in participating in organized social activity—here the activity of fighting fires. To participate thus, one must not only be qualified to do the work, but also willing to cooperate with others in the organized, disciplined activity.

The right to a job is a valuable interest that can be a source of the acquisition of property in the form of wages—if one does the work. But suspension of the opportunity to do that particular work does not deprive the employee of the opportunity to work at other things—

either other employment for others or for himself, or to perform needed work around the home—or even to take a vacation. If the suspension is found unjustified, under the Illinois statute, the employee is paid for the period of his suspension.

We do not mean to minimize the inconvenience and even hardship that may result to an employee because of a suspension of several weeks, or even a week's duration. But, as Justices Powell and Blackmun recognized in *Arnett v. Kennedy*, 416 U.S. at 164, the interest of the government in having the discretion expeditiously to discipline and remove employees who hinder governmental operations outweighs the private interests of the employee.

Nor is it to be presumed that a tenured civil service employee—particularly one who, like Muscare, has enjoyed that status for 20 years—is so devoid of funds that he cannot endure a short interruption of his employment. Furthermore, most suspensions are for much less than 29 days; usually they are for only a few days, or even only one day. Therefore, the welfare cases cited by respondent, such as *Goldberg v. Kelly*, 397 U.S. 254 (1970), which held that due process requires a pretermination hearing in revocation of benefits, are inapposite. A welfare recipient is by definition on the brink of starvation and his right to benefits is a statutory entitlement to a modest amount of personal property, not a simple opportunity to do remunerative work.

In like manner, the garnishment cases cited by respondent, such as *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), and *North Georgia Finishing Co. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), are also not pertinent. Most garnisheed employees are insolvent. The wages garnisheed are more than an opportunity to earn

money, by doing work; they are money already so earned, to which, except for the garnishment (and tax withholdings), the employee would have the exclusive right of enjoyment.

Analogous considerations make *Fuentes v. Shevin*, 407 U.S. 67 (1972) inapplicable; that case concerned due process in repossession and seems to have been reversed two years later by *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974).

Several of the other cases cited by respondent are even less relevant to the issue presented here. *Morrisey v. Brewer*, 480 U.S. 471 (1972), which held that at least an informal hearing is required in revocation of parole, *Gagnon v. Scaparelli*, 411 U.S. 778 (1972) (probation revocation), and *Wolff v. McDonald*, 418 U.S. 539 (1974) (in-prison discipline cases), all concerned the imposition or reimposition of criminal penalties, in which due process requires a prior hearing.

The able amicus curiae brief of the Coalition of American Public Employees (pp. 17-21) argues at length that a presuspension hearing was required, even under the facts of the instant case, in order to afford Muscare an opportunity to justify his conduct and to prove mitigating circumstances to the superior having authority to impose a penalty. This argument overlooks the fact that Muscare had such a hearing before a departmental board, which reprimanded him as not knowing the meaning of discipline and ordered him to shave off his beard (App. 124-125)—an order with which he first complied, then defied. Even if this hearing had not taken place, Muscare had a statutory right to a post-suspension hearing under Illinois Rev. Stat. ch. 24, par. 10-1-18, with the statutory right to judicial review—rights he chose not to exercise. We submit that under the authority of *Arnett v. Kennedy*, 416 U.S. 134 (1974) and *Boehning v. Indiana State Employees Assn.*, ... U.S.

....., 44 L.W. 3275 (1975), the availability of this procedure to Muscare satisfied his claim to due process.

Indeed, the Court has already distinguished the cases on which respondent and the amici curiae rely—such as *Goldberg v. Kelly*, 397 U.S. 254 (1970), *Fuentes v. Shevin*, 407 U.S. 67 (1972), *Bell v. Burson*, 402 U.S. 535 (1971), and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969)—from the situation in the case at bar. The opinion of the Court in *Arnett v. Kennedy*, 416 U.S. 134, at 155 (1974), states most forcefully and with unmistakable lucidity:

> "These cases deal with areas of the law dissimilar to one another and to the area of governmental employer-employee relationships with which we deal here. The types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under that clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests.
>
> " 'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' *Cafeteria Workers v. McElroy*, 367 U.S. at 895, 6 L.Ed. 2d 1230."

In the governmental employer-employee relationship, the government's interest, and hence the public's interest, is in the maintenance of employee efficiency and discipline, as the concurring opinion of Mr. Justice Powell in *Arnett* recognized (416 U.S. at 168) and further noted:

> "This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch."

III.

THE NEW RULES OF PROCEDURE FOR EMPLOYEE DISCIPLINARY PROCEEDINGS WHICH CHICAGO HAS ADOPTED DO NOT CONSTITUTE A CONFESSION OF ERROR BY THE CITY.

On pages 4 and 5 of his brief on the merits, respondent correctly calls the attention of the Court to the fact that in August, 1975, the Rules of the Civil Service Commission of the City of Chicago were amended to provide in Rule VI, Section 7 for presuspension hearings in all suspensions, except emergency suspensions, which are also regulated in careful detail. These new rules are applicable to all civil service employees of the City of Chicago except members of its police department, who are governed by analogous rules, with right to a hearing before the Police Board instead of the Civil Service Commission (now called the Personnel Board).

This procedural change was adopted as an interim measure in the wake of the decision of the court of appeals in the case at bar. Since the disciplining of some municipal employees is a continuing experience, it was determined that it would be prudent to conduct such proceedings in accordance with the dictates of the Seventh Circuit, even if that were cumbersome and of doubtful efficiency and effectiveness, at least until the issues raised had been settled by this Court, if it chose to review the case, which it has done, rather than risk the possibility of suspensions entered in violation of the employee's constitutional rights.

Section 7B of the amended rules provides that in suspensions of not more than five days, in the absence of emergency, no suspension shall be effective for 24 hours

after service of the notice of suspension. If no request for a hearing is made during those 24 hours, the suspension becomes effective upon the expiration of the 24 hours. If the employee requests a hearing, and if, after reviewing the record of the hearing, the department head conforms to his initial decision, the suspension does not become effective until the department head notifies the Civil Service Commission.

Emergency suspensions are processed differently. In such cases the notice of suspension served upon the employee must include an express finding by the department head that the public safety or the good of the department, or both, require the immediate suspension of the employee. Thereupon, not later than seven days after service of the notice of emergency suspension upon the employee, the Civil Service Commission must review the order of the department head, together with the reasons therefor. If the order is reversed by the Commission, the employee shall be reinstated and paid for any period of suspension resulting from the order. If the order is preliminarily affirmed, the Civil Service Commission shall within 21 days of such affirmance afford the employee an opportunity to appear before the Commission and receive a hearing. If the Civil Service Commission, upon a hearing, determines that the suspension was unwarranted, the employee is to be reinstated and paid for the period of unwarranted suspension.

In non-emergency suspensions in excess of five days, the employee may obtain a hearing before the Civil Service Commission upon request made within 24 hours after service of the notice of suspension. If no such request is made within the 24 hours, the suspension shall then become effective immediately. If a hearing is seasonably requested, and the Commission, after a hear-

ing, affirms the order, the suspension then becomes effective immediately.

A copy of these rules must be attached to every notice of suspension.

These changes in suspension procedures do not constitute a confession of error by the petitioner in the instant case. As we have stated, they are an interim measure, an experiment which may become a permanent part of the general overhauling of employment relations within the local government of the City of Chicago, now going on, which is being made pursuant to the home-rule powers granted the City by the Illinois Constitution of 1970.

In our petitioner's brief on the merits (pp. 28, 29), we declared, "It may well be that from a management-employee relations point of view, pre-suspension hearing is, in most instances, preferable to a post-suspension hearing, provided the governmental agency has the available resources . . . [E]ven if pre-suspension hearings are usually preferable, that does not make them a constitutional imperative."

We are not aware of any dissatisfaction on the part of two of the various amici curiae, who have filed briefs in support of the position of the respondent, with the present employee suspension procedures of the City of Chicago. The admonitions of the American Civil Liberties Union and the Coalition of American Public Employees as to the desirability of pre-suspension procedures are, we believe, fully met by these new rules. If they work out satisfactorily, the likelihood is that they will be continued in effect. It is not true that such advantages have not been extended to Chicago police officers, as is stated in the amicus curiae brief filed by the Chicago Patrolmen's Association (p. 2). Police officers

are governed by similar rules, but with the right to a hearing before the Police Board, instead of the Civil Service Commission (now known as the Personnel Board). Moreover, no police officers are parties to the present controversy and there is nothing in the record relating to the special problems of police departments.

IV.

THE FACIAL HAIR RULE OF THE CHICAGO FIRE DEPARTMENT IS CONSTITUTIONAL.

It is the view of numerous fire departments throughout the nation that hair, in excess of modest limits, on the face of a fireman interferes with the efficient use of the safety masks that firemen must frequently wear. This is evident from the lawsuits concerning this issue, such as *Yarbrough v. City of Jacksonville*, 363 F. Supp. 1176 (D.C. Md., Fla. 1973) and *Hordorwich v. Board of Police and Fire Commissioners of Melrose Park*, 18 Ill. App. 3d 20 (1974). See also the Health and Safety Standards of the Fire Department of New York City (Prentice-Hall Public Personnel Administration, vol. 2, no. 4, p. 5 (July 30, 1974)).

Given the current desire of many men to wear beards and/or long hair, the recurring question of the constitutionality of the fire department regulations limiting facial hair has become one of pervasive importance, which should ultimately be settled by this Court. That this is so is clearly indicated by the grant of certiorari by this Court in *Barry v. Dwen*, No. 74-1269 (argued December 8, 1975), which is concerned with the validity of analogous, but less urgent hair rules for policemen.

Although this Court, in reversing a court of appeals, commonly does not pass upon questions not ruled upon by the court of appeals, but remands the case to the

court of appeals for consideration by it of such issues (*Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 at 397, 398 (1971), there is nothing to prevent this Court from disposing of such an issue itself. Where there are reasons for expediting solution of the question, this Court has seen fit to do so. *Dandridge v. Williams*, 397 U.S. 471 (1970); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, at 140 (1974). This is admitted by the amicus curiae brief of the AFL-CIO (p. 30).

The facial hair rule of the Chicago Fire Department is a safety measure. Firefighting is one of the most hazardous of occupations. Safety is a compelling governmental interest. The safety of firemen and the public should not continue to be jeopardized by uncertainty about the validity of facial hair rules for firefighters.

Respondent has failed to argue the validity of the facial hair rule on the merits (Respondent's Brief, p. 2). By so doing, we submit, respondent has waived the issue.

It is true respondent states (*ibid.*) that "On this question, Respondent adopts the response of Amicus Curiae, AFL/CIO." However, the AFL-CIO is not a party. Respondent cannot discharge its obligation to argue the merits by farming it out to a bystander to argue in a separate brief.

The amicus curiae brief of the AFL-CIO fails to respond to our argument of the issue in our principal brief (pp. 33-40). Instead, the brief presented in the name of the AFL-CIO devotes more "reams of paper" (p. 9) to discussion of whether the right to wear one's hair as one pleases is constitutionally protected—a view not accepted by the Fifth, Sixth, Ninth and Tenth Circuits and at times by the Seventh. The fact of the matter is that all the precedents, even those which most strongly

affirm that the right to determine one's own appearance is of constitutional dimension, such as *Dwen v. Barry*, 483 F. 2d 1126 (2 Cir. 1973), recognize that that right is subject to reasonable limitations in the interest of public safety.

The AFL-CIO brief admits (p. 13) that the safety interest of the Department is legitimate, substantial and entitled to much weight. But the brief is in error in arguing (p. 25) that "the Department has not demonstrated a concern with the efficient use of these masks sufficiently to impel them to assure their availability." On the contrary, the Chicago Fire Department has provided such masks since 1958 (App. 100, 104). Two such masks are assigned to each hook and ladder company, and two masks are assigned to each of 24 engine companies. The department plans to have seven flying squads, each with six masks apiece. In 1973 the department purchased 150 new gas masks at a cost of $400 each. The Department has also demonstrated an interest in the efficient use of the masks by promulgating—and enforcing—the facial hair rule.

From the fact that the rule permits limited moustaches and limited sideburns and that some firemen wear these, apparently without interfering with the working of the masks, the AFL-CIO brief (p. 7) argues that "many people with facial hair do obtain an adequate seal." This is a confusion of genus and species. We are here concerned not with a prohibition of all facial hair, but with the validity of the ban on the type of facial hair prohibited by the rule. The permission given the firemen to wear limited moustaches and limited sideburns demonstrates the concern of the Department to interfere with the personal appearance of its firefighters no more than necessary.

The AFL-CIO brief, while admitting the importance of the safety consideration, argues (p. 13) as though "the intrusion here . . . beyond working hours into the firemen's daily lives" is the paramount consideration. Apart from the intrusion being susceptible of exaggeration, there is nothing to prevent hair enthusiasts from wearing wigs and false whiskers in off-hours. However, it seems better to recognize this indirect effect of the rule as one of the many sacrifices a man must make in choosing to be a fireman.

The suggestion in the AFL-CIO brief (pp. 13, 14) that a fireman's right to wear a beard should be determined by individual testing is unrealistic. Individual testing would be inconclusive. The men do not have their own individual masks, but take one available on the particular fire truck on which they happen to be working at the time. Conceivably, a beard might not interfere with the functioning of one mask, but would do so with another. Furthermore, beards continue to grow. A test result might no longer be valid a month later. Clearly, the individual testing of men choosing to wear beards would have to be repeated periodically and frequently.

The amicus curiae brief of the AFL-CIO fails to recognize what the district court so clearly understood, when it correctly stated in its opinion (App. 148, 149):

> "What we have before us is the validity of a regulation and its reasonableness generally. And the question of whether it is reasonable in terms of the individual context, which was raised here, I don't think is relevant . . . After hearing the evidence and examining the exhibits, I find the justification of the Fire Department, that is, the requirement limiting facial hair for reasons of safety related to the fit of the face mask of self-contained breathing apparatus, is neither capricious nor arbitrary justification. It appears to be grounded in reason. And it also appears to be a minor abridgement of personal liberty, which is justified by safety regulation."

CONCLUSION

The decision of the district court is supported by substantial evidence and is not clearly erroneous. Its reversal by the court of appeals was therefore error and should be reversed.

Respectfully submitted,

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March 24, 1976

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No. 75-130

Supreme Court of the United States

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Petitioner,

v.

FRANCIS MUSCARE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

AND

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief amicus in the instant case in support of the position of the Respondent, as provided for in Rule 42 of the Rules of this Court. The consent of counsel for the Respondent has been obtained. Counsel for the Petitioner have refused their consent.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of 115 national and inter-

national unions having a total membership of approximately 13,500,000 working men and women.

Many of the Federation's affiliates represent employees of the federal, state, municipal and county governments, and of other governmental bodies such as school boards and public universities. To those employees, the issues in this case are of vital importance. First, since most of these workers are dependent upon their incomes to meet their daily needs, the right to adequate notice and an opportunity to be heard before they can be deprived of that income for as long as one month is critical. And second, to require that public employees conform their appearance to rigid norms not required by any important public interest related to their employment, in ways which affect them in their off-duty hours as well as when at work, is to deny them the right to determine one's own appearance enjoyed by the general public, and to segregate them from their contemporaries in their private as well as their public lives. This being so, the Federation's interest in presenting its views to this Court upon this case is evident.

THE ISSUE TO BE COVERED IN THE AFL-CIO'S BRIEF AMICUS CURIAE

Respondent has limited his brief to the procedural due process issue upon the premise, in which we concur, that the issue of the validity of the grooming regulations ought not be considered at this time by the Court, since it was not decided by the Court of Appeals. Because we believe the procedural due process issue has been fully covered by Respondent and other amici curiae supporting his position, we do not in our brief cover this issue, except to express our agreement with the Court of Appeals and Respondent.

Rather, to assure that the issue of the validity of the grooming regulation is discussed on Respondent's behalf in this case should the Court find reason to address the question, we confine our substantive argument to that issue.

CONCLUSION

For the above-stated reasons, we respectfully urge the Court to grant this motion to file the accompanying brief amicus in the instant case in support of the position of the Respondent.

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Supreme Court of the United States

October Term, 1975

No. 75-130

ROBERT J. QUINN, INDIVIDUALLY AND AS COMMISSIONER OF THE CHICAGO FIRE DEPARTMENT,

Petitioner,

v.

FRANCIS MUSCARE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (hereinafter "AFL-CIO") files this brief contingent upon the granting of the foregoing motion.

ARGUMENT

I. INTRODUCTION

The AFL-CIO agrees with Respondent that, as the Court of Appeals held, this Court's decisions in *Arnett* v. *Kennedy*, 416 U.S. 134 and *Goss* v. *Lopez*, 419 U.S. 565, necessitate a holding that Lt. Muscare was unconstitutionally denied procedural due process when he was suspended for

twenty-nine days from his employment as a fireman without any notice prior to his suspension sufficient to apprise him of the reasons therefor, and with no opportunity whatever to contest before a person vested with authority to impose the punishment the grounds for his suspension, on factual or legal grounds, or the propriety of the penalty set, until after the suspension was effective. Since the Court of Appeals found the suspension unconstitutional for that reason alone, it had no occasion to address the additional grounds pressed for invalidating the suspension, involving the substantive bases upon which Respondent was subjected to loss of his income for a time.

Ordinarily, this Court, when presented with an independent issue which the Court of Appeals properly did not reach because of the view it took of the case, will determine only the issue decided below and, if the decision is to reverse on that question,[1] provide the Court of Appeals the opportunity to decide the remaining issue or issues in the first instance. See, e.g., *Wood* v. *Stickland,* 420 U.S. 308, 327; *United States* v. *ITT Continental Baking Co.,* 420 U.S. 223, 226 n. 2 and cases cited; *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388. See also cases cited in Brief for Respondent, at 2, n. 1.

[1] Conceivably, the validity of the hair regulation could remain a live issue in this case even if the Court of Appeals is affirmed on the procedural due process question. The Court of Appeals for the Seventh Circuit has recently held, in a case decided after this case, that while damages are available for deprivation of procedural due process rights, the measure of these damages is not necessarily the full amount of wages lost. *Hostrop* v. *Board of Junior College Dist. No. 515,* 523 F.2d 569 (7th Cir. 1975). On the other hand, it seems clear that if Respondent's suspension were substantively invalid, he would be entitled to all wages lost as damages. However, since the issue of the appropriate remedy is not before this Court, and the correctness or applicability of the *Hostrop* rule therefore not now pertinent, it must be left to the lower courts upon remand to determine whether *Hostrop* necessitates reaching the validity of hair regulation. Since *Hostrop* was decided after this case, and since the district court has already decided the hair issue while the Court of Appeals has not, the remand, if any, should be to the Court of Appeals.

We can preceive no reason for departing from this rule in the present case. In instances in which this Court has determined questions not decided below, the two grounds for decisions were usually intimately interrelated, e.g., *Dandridge* v. *Williams,* 397 U.S. 471, n. 6, or there were extenuating circumstances justifying hurrying the case to its final conclusion, e.g., *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 140 n. 25. Here, the procedural and substantive challenges are entirely separate in the applicable legal considerations, and there is no special reason why the parties require the immediate determination of the substantive challenge. While it is true, as petitioners assert (Brief for Petitioner, at 33-34), that another petition for certiorari may result, this is always the case when the Court remands for consideration of issues not decided by the Court of Appeals.

We recognize, however, that the Court may perceive reasons for reaching and deciding the validity of the grooming regulation,[2] and that it does not lack the power to do so. See *Dandridge, supra; Regional Rail Reorganization Cases, supra.* For this reason, and because Respondent and amici supporting its position have, we understand, determined to

[2] For example, this Court, in *Barry* v. *Dwen,* No. 74-1269, argued December 8, 1975, is now considering the principles affecting the validity of hair rules for policemen.

present argument only upon the procedural due process question, we present our views upon the validity of the grooming code for violation of which Lt. Muscare was disciplined, rather than burden the Court with another exposition of the relatively simple procedural due process question. We begin with a short exposition of the record upon the grooming code issue and proceed to discuss the legal questions we believe to be involved.

II

Section 51.133 of the Rules and Regulations of the Chicago Fire Department prescribe certain personal appearance requirements for uniformed personnel. The Rule provides:

> "Section 51.133. Proper Personal Appearance. All members of the Chicago Fire Department shall present a clean and proper appearance in personal care and attire at all times. The face shall be clean-shaven, except that a non-eccentric mustache is permissable. Mustaches shall not extend beyond a line perpendicular to the corner of the mouth and the full upper lip must be readily visible.
>
> Sideburns shall be trimmed short and shall be no lower than a line from the middle of the ear.
>
> Hair shall be worn neatly and closely trimmed, and the hair outline shall follow the contour of the ear and slope to the back of the neck. It will be gradually tapered overall, in order to present a neat appearance."[3]

The standards in Rule 51.133 are applicable to all uniformed personnel of the Department, without regard to whether or not their duties involve active firefighting.

[3] This formal promulgation replaced two earlier formulations of grooming rules. (App. 125-126; 156-157).

(App. 118-120). It is to be noted that while the Rule absolutely forbids beards, it does not proscribe all forms of facial hair: certain mustaches and sideburns are permitted. Further, the Rule regulates hair other than facial hair, and forbids certain hairstyles even though no hair extends beyond the collar or onto the face.

Lt. Muscare, when he was suspended on February 27, 1974, had a small mustache and a short goatee (App. 5, 10-11). The notice of suspension, received several days thereafter, specified violation of Rule 51.133 as a ground for his suspension (App. 12).[4]

The sole justification offered by the Department for the challenged hair regulations was that safety considerations, in particular the need for effective use of a certain self-contained breathing apparatus used in fire-fighting situations, necessitated that firemen not wear facial hair. Petitioner not only did not proffer any other explanation, but its spokesmen explicitly testified that neither a general interest in discipline and obedience nor a concern with appearance of firemen was the purpose of the rule. For example, while Chief Foley testified that the Department is "paramilitary" (App. 111), he meant by that only "that we have levels of

[4] As far as the record shows, the claimed violation of two other sections of the Rules and Regulations charged in the Notice was also based solely upon violation of the grooming rules (App. 117, 148), although Respondent had no way of knowing this when he received the notice since no supporting facts whatever were specified. While there is some implication in Petitioner's Brief that Lt. Muscare was ordered at a training class in December, 1973 to don his mask and to walk down stairs with it on but refused to do so (Brief for Petitioner 8), it is, as the Court of Appeals stated, (App. 161) "unclear whether Lt. Muscare, as a senior officer, was required to participate in the training." (See App. 70).

rank" (App. 115), but maintained that "[i]t doesn't necessarily stand to follow that our operational orders are of a military nature" (App. 115) and, in particular, denied that "you want orders obeyed in a military sense" (App. 117-118), saying "No, we want orders obeyed because we have a reason to have a man clean-shaven, for safety with air gear." (App. 118). Similarly, Chief Foley testified that "[t]he basic premise of the clean-shaven order is safety, not appearance." (App. 112).

The evidence upon the relationship between the breathing apparatus and facial hair was as follows:

The Fire Department instituted a self-contained breathing apparatus program in 1958. (App. 100). The administrative goal is two such pieces of equipment for each five-man company of the kind Lt. Muscare commands. (App. 100-101). However, there are not necessarily any masks available to such a company at any given time, because they may be in need of repair. (App. 101, 102, 104, 106).

In order for the breathing apparatus to work properly, the mask must be air-tight. In order to test for a proper seal, the following procedure is followed:

> "A. When the face piece is put on the face, there are five straps, head straps that you must adjust for tightness, starting at the bottom and then the temple straps and the top one, if necessary. After that, you either kink your breathing tube or put your hand over the the bottom and inhale to see if you have a proper seal on the face piece. If you have a proper seal, the face piece will collapse; if not, you will detect leaks around the edge of the face piece." (App. 65; see also App. 128).

Many factors can interfere with the ability to obtain a

proper seal, including facial hair of various sorts, dentures, oddly shaped faces, eye glasses, and boils. (App. 73, 88, 93, 95, 96). All witnesses for the Department agreed that the only certain way to determine whether a person can obtain a proper seal is for him to try the mask and test it himself. (App. 53, 67, 88, 94, 111).

The witnesses for the Department did express the belief that facial hair—sideburns and mustaches as well as beards—can interfere with the use of the latest kind of self-contained breathing equipment.[5] (App. 53, 55, 87, 88, 91, 112). However, many people with facial hair do obtain an adequate seal. (App. 74, 75, 93). In fact, Leonard Johnson, who provides instruction for the Department upon the use of the breathing equipment, testified that he realized that while he instructs that mustaches and sideburns can interfere with a proper seal, the Department permits them, many firemen wear them, and there has never been any problem in his experience in obtaining a seal by those firemen. (App. 61, 73-74, 75).

None of the Department's witnesses had any direct knowledge concerning whether or not Lt. Muscare could obtain a proper seal with the equipment (App. 72, 94, 111). Lt. Muscare, however, testified that he had used the self-contained breathing apparatus while wearing his goatee several times, both in actual fire-fighting situations and in drills, and had never experienced any problem with obtaining a proper seal. (App. 127, 129). In particular, he testified:

"Q. [W]hat test did you do to see if the mask sealed

[5] Some of the masks currently in use in the Fire Department are older Chemox masks. (App. 104-105). The evidence was not specific upon whether facial hair can affect the use of these masks.

on your face?

A. Put the mask on, slipping it up over your head on your chin first, take the two side straps on the mask, the top one and then the single one on top, put the tube on, put your hand on the bottom of the tube and suck and it should collapse on your face.
Q. And what was the result of your performance?
A. It collapsed on my face." (App. 128; see also App. 129.)

The district court, in ruling upon the validity of Rule 51.133, did not consider "in this ruling at all the issue of whether the Fire Department may have a dress and appearance code, solely for uniformity and the impression made on the public • • • " (App. 149). Rather, recognizing that the Fire Department had advanced only a safety justification,[6] the judge said that "[t]he question here is whether we have a justifiable regulation on the basis of which the Fire Department purports to justify it." (*Id.*) He found that "the requirement limiting facial hair for reasons of safety related to the fit of the face mask of self-contained breathing apparatus • • • appears to be grounded in reason," and therefore upheld the regulation. (*Id.*)

The Court of Appeals, while declining to rule conclusively upon the issue, questioned the district court's conclusion:

> "In passing, we note but without holding that the challenged hair regulation, § 51.133, does not appear to be co-extensive with the need for safe and efficient use of gas masks • • •." (App. 160, n. 2)

[6] The safety justification, as the above summary indicates, was limited to asserted problems with breathing apparatus.

III

Reams of paper and countless hours of judicial time have been expended in federal courts in the last several years on the question of whether the right to wear one's hair as one pleases is constitutionally protected at all and, if so, the extent of the protection. Whatever the differences between the courts, we believe it undeniable that the Fourteenth Amendment of the Constitution does impose restraints upon the interference of state governmental bodies with the personal appearance choices of citizens, and that the task for the courts is to indicate the parameters of the permissible restraints. Clearly, the right to "liberty" protected by the Fourteenth Amendment (and the Fifth Amendment) "is not confined to mere freedom from bodily restraint." *Bolling* v. *Sharp*, 347 U.S. 497, 499-500. Rather, the right to liberty "is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Poe* v. *Ullman*, 367 U.S. 497, 543 (Mr. Justice Harlan, dissenting). Thus, "[i]n a line of decisions, going back perhaps as far as *Union Pacific R. Co.* v. *Botsford*, 141 U.S. 250 (1891), the Court has recognized • • • a guarantee of certain areas • • • of privacy • • • under the Constitution." *Roe* v. *Wade*, 410 U.S. 113, 152.

As the cases cited in the *Roe* opinion, 410 U.S. at 152-153 show,[7] the Court's definition of the areas into which the government may not interfere has not been limited to "privacy" in the sense of things which occur in secret, or which a person may attempt to hide from the government

[7] See also, e. g. *Kent* v. *Dulles*, 357 U.S. 116; *Shapiro* v. *Thompson*, 394 U.S. 618; *Stanley* v. *Georgia*, 394 U.S. 557.

or the public. Rather, these aspects of liberty are "private" in the sense that the government ordinarily has no legitimate interest in them, and citizens are therefore free to make their own decisions regarding them. For example, the right to educate one's children as one sees fit, within certain limits, protected in *Pierce* v. *Society of Sisters,* 268 U.S. 510, 535, and *Meyer* v. *Nebraska,* 262 U.S. 390, 399, arises from the fact that there is no "general power of the state to standardize its children," *Pierce, supra,* 268 U.S. at 535; it is not dependent upon whether the parent wishes to broadcast or to conceal the choice of education made for the child.

Thus, the "liberty" protection of the Fourteenth Amendment extends to "those privileges long recognized • • • as essential to the orderly pursuit of happiness by free man." *Meyer, supra,* 262 U.S., at 399; it is not limited to the particular guarantees spelled out in the First through Eighth Amendments, or to those particular additional rights recognized by this Court at any particular time. Nor can it be limited to intrusions into momentous matters. For, as the Courts of Appeals which have dealt with hair regulation have recognized,[8] the liberty protection is designed to safeguard against authoritarianism generally, a hallmark of which is interference into aspects of human existence which are *not* of great public importance but matter a great deal to the individual, such as dress and hairstyles.[9]

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[8] *E.g., Richards* v. *Thurston,* 424 F.2d 1281, 1285; *Crews* v. *Clone,* 432 F.2d 1259, 1264.

[9] For example, much of the discomfort Americans feel in visiting countries in Eastern Europe, or China, is expressed as dismay over the physical uniformity in appearance, and the lack of individualism in dress.

Thus, it seems clear that a state or municipality could not prescribe in detail the hairstyles to be worn by all women walking the public streets without running afoul of the Constitutional liberty protection, even if the particular hairstyle proscribed was one currently in vogue at the time of the regulation. Nor, it seems to us, could the Government require of its own employees, for purposes of identifiability, modes of grooming likely to subject them to ridicule in their off-duty hours—shaven heads for men, for example.

On the other hand, just as the Constitution does not grant citizens an "unlimited right to do with one's body as one pleases." *Roe, supra,* 410 U.S., at 154, the right to determine one's own appearance is far from unlimited. Clearly, the government can limit this right in pursuit of *legitimate* objectives, as long as the regulation is rationally related to the objective, as long as the objective is in fact legitimate, and as long as the degree of the intrusion does not unnecessarily go far beyond its justification. For example, we doubt that an interest in uniformity could ever suffice to justify regulation of appearance of citizens generally. See, e.g., *O'Connor* v. *Donaldson,* 422 U.S. 563, 575:

> "May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."

Yet, a government does have a strong interest in assuring that certain of its employees are readily identifiable, so that the public can recognize their authority immediately.

To this end, and to the extent required by the identifiability need, a state or city may require uniformity of appearance during working hours, s is commonly done for policemen and, as in this case, for firemen. But once the extent of the regulation reaches beyond the interest which justifies it, we believe it unconstitutionally intrudes into that area of self-determination of personality and life style which the Constitution protects. Thus, since a city has no interest in whether firemen are readily identifiable as such when they are not on duty, it could not require them to wear uniforms even when not working.

It appears, then, that the focus in assessing the validity of grooming regulations must be threefold. First, what is the purpose of the regulation, and is that purpose a legitimate one? Second, to what extent does the regulation intrude upon the ordinary perogative of an individual to determine his own appearance? And finally, and often determinative, is the scope of the regulation, both in terms of coverage and degree of intrusion, generally coextensive with the justification for it?

IV

Using this approach, it seems apparent that the Department's Rule 51.133 cannot stand. As indicated above, *supra* at 5, 8, the sole justification offered for the rule was that facial hair can interfere with the use of self-containing breathing equipment. The Department not only did not suggest any other interest in the matter, but its spokesmen affirmatively disclaimed any other concern. *Supra*, at 5-6. In these circumstances, the analysis must be confined to the justification pressed below.[10]

[10] We note in passing that even if this Court were to inquire

The interest asserted by the Department in safety is obviously one not only legitimate but, if substantiated, entitled to much weight. Thus, safety regulations mandated by state and federal governments for employees generally, not only government employees, can and do prescribe apparel to be worn on the job to assure against accidents, and any deprivation of a liberty interest involved can surely be overriden by that goal.

But the intrusion here reaches beyond working hours into the firemen's daily lives, since one cannot instantaneously grow and ungrow facial hair. And a hair regulation entails control of one's physical body, rather than merely determining what is put on it.

This is not to say that even such an intrusion could be justified by safety concerns in the proper case. Here, however, the regulation on its face goes far beyond any safety need conceivably shown on this record. There was undisputed testimony that only the wearer can tell if a mask fits properly, and that Lt. Muscare always succeeded in achiev-

into whether the disclaimed purposes could justify the Rule, the Rule still could not stand. First, any interest the Department might have is assuring identifiability of its personnel while on duty surely could not justify it. There is an intrusion into the employees' off-duty hours when hair styles are regulated which uniforms and general neatness standards do not present; and the uniform suffices to assure the identification required. The notion that the public might question whether a uniformed fireman with a beard is really a fireman, if it has any basis in fact at all, could arise only because of general knowledge that the Department does not hire firemen with beards. For example, the public might have some doubt whether a woman in a fireman's uniform was really a fireman, never having seen a woman fireman. Surely, this perception could not justify a refusal to hire women, and it is doubtful that it could justify a rule that all women fireman wear uniform

ing a proper seal when wearing his beard [11] (*supra,* at 6-7). Moreover, the fire department's reliance upon these masks for safety seems questionable: not only are there never enough masks available for all the firemen at the scene of a fire (App. 103-104), but some companies at times have no masks at all. (*supra,* at 6.) Further, the grooming regulations apply to individuals whose assignments do not include active firefighting (*supra,* at 4), and regulates hair other than facial hair although there was no evidence that such hair can affect the seal on the breathing apparatus. Finally and most significant, the regulation *permits* certain facial hair—mustaches and sideburns—even though the testimony on impact of facial hair upon safety masks did not distinguish between beards on the one hand and mustaches and sideburns on the other.

Thus, the regulation in some respects goes far beyond its asserted purpose, and in other ways is inadequate to assure the claimed goal. Moreover, when the Department has not demonstrated a concern with the efficient use of these masks sufficient to impel them to assure their availability at all, this Court should not sanction an intrusion into the constitutional rights of employees which carries over into nonworking hours. And to the extent that there is any serious concern with the fit of the masks, the Department need only require firemen to test the masks intermittently to see if they work on their faces; if a fireman with facial hair failed to achieve a seal, an order to shave might then be justified. In this circumstance, to uphold the regulation would be to sanction a deprivation of liberty which is unnecessary, broader than any conceivable justification based on use of breathing apparatus, and, in view both of the exceptions in the regulation itself and the Department's actions concerning the masks, is not rationally related to any safety goals which *this* Department has set. Therefore, the Rule 51.133 must be declared invalid.

blond wigs, or short hair, to assure the public of their *bona fides.*

Second, an interest in discipline *qua* discipline is not, at least in the fire department context here, a legitimate concern in itself. As Chief Foley recognized in testifying in the district court, *any* organization has an interest in having employees follow directives (App. 115). But to exalt that interest into a justification for imposing arbitrary rules upon civilian employees without any independent purpose whatever would be to sanction any intrusion into the constitutional rights of government employees. *Cf. Keyishian* v. *Board of Regents,* 385 U.S. 589, 605-606: "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."

[11] Petitioner seems to suggest that because Lt. Muscare did not put on the breathing apparatus at the district court hearing, the record is not conclusive upon whether he could obtain a seal. (Brief for Petitioner, at 12.) Surely, there is no rule of evidence which requires a party to substantiate undisputed testimony with a physical demonstration.

CONCLUSION

For the foregoing reasons, if the Court determines to decide the validity of Rule 51.133, the Rule should be declared unconstitutional, and the judgment of the Court of Appeals that Lt. Muscare was unconstitutionally suspended affirmed.

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No. 75-130

In the Supreme Court of the United States

OCTOBER TERM, 1975

ROBERT J. QUINN, individually and as Commissioner of the Chicago Fire Department,

Petitioner,

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Judicial Circuit

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BRIEF FOR THE CHICAGO PATROLMEN'S ASSOCIATION AMICUS CURIAE

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

Established in 1916, the Chicago Patrolmen's Association is an Illinois not-for-profit corporation consisting of approximately four thousand police officer members of the Chicago Police Department. The purposes of the organi-

zation are to promote intellectual, social and economic interests of its membership. The Association is interested in all matters which bear directly upon the working conditions and job security of its members.

The *Amicus* is particularly interested in the case now before the Court because its membership is now, because of the Illinois Supreme Court's recent decision in *Kropel* v. *Conlisk*, 60 Ill.2d 17 (1975), subject to the same general statutory "protection" afforded to the Respondent fireman in this case. Under pressure from the courts, particularly the United States Court of Appeals for the Seventh Circuit in its opinion now under review, *Muscare* v. *Quinn*, 520 F.2d 1212 (1975), the Chicago Police Department has recently adopted General Order number 75-22, effective December 15, 1975, which apparently grants many of the pre-suspension rights Respondent seeks in this case to Chicago police officers. An anomalous situation now exists in the City of Chicago in which those individuals electing to fight fires for a living are governed by a different set of procedural job protection rules than those who fight crime. Clearly there is no reasonable basis for this type of distinction.

The *Amicus* is interested in having its membership's newly vested rights made a matter of constitutional guarantee rather than legislative grace, and it urges this Court to so hold.

QUESTIONS PRESENTED

Recognizing that there may be valid distinctions in drafting regulations pertaining to permitted hair styles for police officers and firemen (*see, e.g., Black* v. *Rizzo*, 360 F.Supp. 648 (E.D.Pa.1973)) and noting that the Court has recently heard argument in a case involving a police officer's hair style, *Kelley* v. *Johnson*, ... U.S. ....., 44 LW 3034-3035, this brief is directed solely to these questions:

(1) Whether the Due Process Clause of the Fourteenth Amendment demands that a permanent public employee threatened with suspension from his employment be granted a hearing of some sort prior to his suspension—no matter what its length.

(2) Whether a state statute which provides for only post suspension review of suspensions for more than five days and no review for suspensions of less than five days can stand against this Court's decision in *Goss* v. *Lopez*, 419 U.S. 565 (1975).

ARGUMENT

I.

RESPONDENT HAS CONSTITUTIONALLY COGNIZABLE PROPERTY AND LIBERTY INTERESTS IN HIS GOVERNMENT EMPLOYMENT.

A. The decisions of this Court have held that a government employee has a property interest in his employment which is protected by the Due Process Clause of the Fourteenth Amendment.

In the leading decisions of *Board of Regents of State Colleges* v. *Roth,* 408 U.S. 564 (1972) and *Perry* v. *Sindermann,* 408 U.S. 593 (1972), this Court has held that employees of the State could have property interests in their employment protected by procedural due process. Writing the opinion of the Court in *Roth,* Mr. Justice Stewart concluded that property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 408 U.S., at 577.

This conclusion has been reaffirmed and applied to a federal government employee in this Court's recent decision in *Arnett* v. *Kennedy,* 416 U.S. 134 (1974). In that case, Kennedy was a nonprobationary federal employee in the competitive Civil Service. He was removed from the federal service pursuant to the provisions of the Lloyd-LaFollette Act. Although the five opinions filed in that decision make its import less than clear, all nine Justices conceded that the employee had a property interest in his expectancy of continued employment. Writing the opinion of the Court, Mr. Justice Rehnquist cited the above quoted language from *Roth* and found: "Here appellee did have a statutory expectancy that he not be removed other than for 'such cause as will promote the efficiency of the service.' " 416 U.S., at 151-152. The Illinois civil service statute which applies to the Respondent's terms of employment also provides that "no officer or employee in the classified civil service . . . may be removed or discharged, or suspended for a period of more than 30 days, except for cause. . . ." Illinois Revised Statutes (1973), ch. 24, par. 10-1-18. It is clear that Respondent had a protected property interest in his employment as that term has been defined by the decisions of this Court.

It is settled that once one establishes a valid property interest the procedural protections afforded by the Fourteenth Amendment's Due Process Clause become applicable. Mr. Justice Stewart makes this point explicit in *Roth:* "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." 408 U.S., at 576. This Court has on numerous occasions found that public employees have interests in continued employment that are safeguarded by due process. *See Wieman* v. *Updegraff,* 344 U.S. 183 (1952), *Slochower* v. *Board of Education,* 350 U.S. 551 (1956), and *Connell* v. *Higginbotham,* 403 U.S. 207 (1971). Given this precedent, the opinion of the Court in *Arnett* is somewhat unsettling. In it, Mr. Justice Rehnquist concluded that although the employee had a property interest in his employment, this interest was protected only by the procedural safeguards afforded by the

same legislation that vested the property interest in him, and not by the Due Process Clause of the Fourteenth Amendment: "We, of course, find no constitutional overtones lurking in the statutory issue, because of our holding as to the nature of appellee's property interest in his employment." 416 U.S., at 155, *fn.* 21. Six other Justices disagreed with this view. Mr. Justice Powell's opinion typifies the character of that disagreement: "It seems to me that this approach is incompatible with the principles laid down in *Roth* and *Sindermann*. . . . This view misconceives the origin of the right to procedural due process. That right is conferred not by legislative grace, but by constitutional guarantee." 416 U.S., at 166-167. Despite the statutory construction approach of the opinion of the Court in *Arnett,* and given the inclination of the clear majority of Justices to adhere to *Roth,* interpreting it as providing constitutionally contoured due process protections to those property interests government employees hold in their jobs, that case must be read to affirm the view that once a State statute or regulation grants a public employee a property interest in his employment, the Constitution guarantees him due process of law before that interest can be infringed.

Although the Respondent's employment has only been suspended and not terminated, he is still entitled to procedural due process protections. The cases cited to support due process protections for deprivations of employment "property" interests involved final termination of employment. However, there is ample precedent holding that "to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." *Roth,* 408 U.S., at 570-571 citing *Morrissey* v. *Brewer,* 408 U.S. 471, 481 (1972). "The Court's view has been that as long as a

property deprivation is not *de minimis,* its gravity is irrelevant to the question whether account must be taken of the Due Process Clause." *Goss* v. *Lopez,* 419 U.S. 565, 576 (1975) citing *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337, 342 (1969); *Boddie* v. *Connecticut,* 401 U.S. 371, 378-379 (1971). *See Fuentes* v. *Shevin,* 407 U.S. 67, 86 (1972). Inasmuch as the Respondent's twenty-nine day suspension can hardly be considered *de minimis,* it must qualify as a deprivation subject to the protections afforded by due process.

B. Where one's reputation or integrity is called into question, the decisions of this Court demand that the government provide the fundamentals of due process to allow their vindication.

Even where the Court has failed to find an interest that could be validly characterized as one relating to property, it has held that the due process protections of the Fifth and Fourteenth Amendments are applicable where a person's integrity is challenged by the government in its attempt to remove him from its employment. This Court has characterized such an interest as one in "liberty" and has sketched the contours of its protection. In *Roth* Mr. Justice Stewart, though finding the argument inapplicable to the facts at hand, wrote for the Court "In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed. (Citations omitted) . . . For "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." 408 U.S., at 572-573 citing *Wisconsin* v. *Constantineau,* 400 U.S. 433, 437 (1971); *Wieman supra* at 191; *Joint Anti-Fascist Refugee Committee* v. *McGarth,* 341 U.S. 123 (1958); *United States* v. *Lovett,* 328 U.S. 303, 316-

317 (1946); *Peters* v. *Hobby*, 349 U.S. 331, 352 (Douglas, J., concurring) (1955).

In the case at bar, Respondent was suspended from his employment not only for refusing to remove his beard but for insubordination as defined in Section 61.006 of the Rules and Regulations of the Chicago Fire Department. In paramilitary organizations such as the police and fire departments of municipal governments, such an accusation is an extremely serious one going to one's "reputation, honor, or integrity." Given the public interest and safety these employees are charged with protecting, an allegation of insubordination, even if unsubstantiated, necessarily would demean these employees in the eyes of their co-workers and in the community in which they live. In considering the effect of a short suspension from school on several high schocl students, this Court reviewed the charges of misconduct and concluded:

> "It sustained and recorded, those charges could seriously damage the students standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment. It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution." (footnote omitted) *Goss* v. *Lopez*, 419 U.S., at 575.

Respondent's twenty-five day suspension is certainly as serious as the ten day suspensions involved in *Goss* and the charge of disobeying a superior officer is at least as serious as the misconduct charges involved in that case. These facts militate for a finding that the Respondent was entitled to due process protection to safeguard his good name.

II.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE DECISIONS OF THIS COURT APPLYING IT TO SIMILAR FACTS DICTATE THAT THE RESPONDENT BE GIVEN A HEARING PRIOR TO HIS SUSPENSION FROM GOVERNMENT EMPLOYMENT.

A. Except in the case of an emergency, due process in the case of an employee suspended or dismissed from government employment means granting a presuspension or pretermination hearing in some form to the employee at which he could present his view of the facts.

Determining what due process requires has proven to be a more difficult and complicated task for the courts than establishing what constitute the property and liberty interests entitled to its protection. Mr. Chief Justice Burger writing the opinion of the Court in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) noted: "Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." 408 U.S., at 481. The fundamental principle this Court has consistently applied in a lengthening line of decisions granting pretermination and presuspension hearings is "that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950). Although the case did not involve government employment rights, *Boddie* v. *Connecticut*, 401 U.S. 371

(1971) provides a good summary of the holdings of this Court's relevant decisions. Mr. Justice Harlan there wrote:

> "The formality and procedural requisites for the hearing may vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid government interest is at stake that justifies postponing the hearing until after the event." (footnotes omitted) 401 U.S., at 378-379.

The applicability of the pretermination hearing requirement has been made by this Court in a wide variety of factual contexts: *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), termination of welfare benefits; *Bell* v. *Burson,* 402 U.S. 535 (1971), suspension of driver's license; *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) revocation of parole; *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), seizure of property on a prejudgment writ of replevin; and *Goss* v. *Lopez,* 419 U.S. 565 (1975), suspension of high school students. Citing *Boddie, Bell* and *Goldberg,* Mr. Justice Stewart, writing for the Court in *Board of Regents* v. *Roth,* routinely applied the pretermination hearing requirement to the case of a governmental employee facing discharge. 408 U.S. 564, 570-571, fn 7-8.

Arnett v. *Kennedy,* 416 U.S. 134 (1974) and *Goss* v. *Lopez,* 419 U.S. 565 (1975) when read together present the current state of the law with respect to the necessity of pretermination or presuspension hearings. Given the facts in *Arnett,* this Court held that the federal employee there had no constitutional right to a full evidentiary type hearing before being discharged from his employment. The

decision was very heavily dependent upon the Court's construction of the Lloyd-LaFollette Act which was held to create this employee's property interest in his job. But that legislation not only guaranteed a property interest in employment, it also provided a number of pretermination rights for the employee: "30 days' advance written notice of the reasons for his proposed discharge and the materials on which the notice is based . . . the right to respond to the charges both orally and in writing . . . an opportunity to appear personally before the official having the authority to make or recommend the final decision." 416 U.S., at 170. *Arnett* seems to hold that where the protections provided government employees are essentially equivalent to a pretermination hearing, these procedures satisfy due process requirements. The lower courts seem to have interpreted *Arnett* in this fashion in that no case has specifically upheld the constitutionality of a post-discharge hearing procedure in the absence of some pretermination protections. *See Eley* v. *Morris,* 390 F. Supp. 913, 923 (N.D. Ga. 1975).

Goss v. *Lopez* held that "students facing suspension and the consequent interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing." 419 U.S., at 579. Specifically Mr. Justice White, who delivered the opinion of the Court, concluded "due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." 419 U.S., at 581. With respect to the timing of this hearing he continued: "Since the hearing may occur almost immediately following the misconduct, it follows that as a general rule notice and hearing should precede removal of the student from school." 419 U.S., at 582. Where a stu-

dent poses some threat to the school, "the necessary notice and rudimentary hearing should follow as soon as practicable. . . " 419 U.S., at 582-583.

Given the facts that a twenty-nine day suspension from employment is a serious and substantial deprivation of property, the Illinois statute governing such suspensions provides none of the pretermination rights found in the Lloyd-LaFollette Act, Illinois Revised Statutes (1973) ch. 24, par. 10-1-18, and this Court's decisions have consistently foudn pretermination protections necessary to due process in government employment situations, the Respondent was entitled to a hearing of the sort suggested in *Goss* before he was suspended from his employment.

B. The Chicago Fire Department's perceived need to temporarily suspend the Respondent from his employment does not fall within that class of "emergency" situations which this Court found to merit deprivation of property without a prior hearing.

The decisions of this Court have only rarely and in unusual cases tolerated the deprivation of property without a prior hearing. A brief outline of several of the cases of this type suggests the contours of this Court-created exception. In *Central Union Trust Co.* v. *Garvan,* 254 U.S. 554 (1921), the Court allowed the immediate seizure of property without prior hearing because such property was supposed to belong to the enemy in time of war. *Phillips* v. *Commissioner,* 283 U.S. 589 (1931) upheld a summary procedure used to assess income tax liability on a stock transferee in order to protect the internal revenue. *Ewing* v. *Mytinger & Casselberry, Inc.,* 339 U.S. 594 (1950) and *North American Cold Storage Co.* v. *Chicago,* 211 U.S. 306 (1905) were similar cases dealing with seizure of property which constituted a threat to the public health and

well-being. In *Fahey* v. *Mallonee,* 332 U.S. 245 (1947), the Court allowed the Federal Home Loan Bank Board to have a conservator take possession of a bank before hearing. Conceding the action was a "drastic procedure", Mr. Justice Jackson justified it citing the "impossibility of preserving credit during an investigation" and alluding to the special customs and practices of the banking industry. 332 U.S., at 253-254. *Yakus* v. *United States,* 321 U.S. 414 (1944) and *Bowles* v. *Willingham,* 321 U.S. 503 (1944) upheld the summary procedures of the Emergency Price Control Act of 1942 on the grounds that in time of war they were necessary to preserve the economic well-being of the general public.

All of the cases suggest that the deprivation of property without a prior hearing will be sanctioned only when such deprivation is necessary to immediately protect a specific and compelling interest of a large segment of the public. The exception has not been applied to facilitate the functioning of the government bureaucracy or to make its personnel management more "efficient." Petitioner's argument that according the Respondent a hearing prior to suspending him "would place a burden on the municipality disruptive of government efficiency" (Br. at 28) lacks weight when contrasted with the respect accorded due process protections by the decisions of this Court.

C. The balancing of interests test is not properly used to determine whether there must be a presuspension hearing but only to establish the character of that hearing.

The decisions of this Court indicate that a balancing of interests approach has some validity when used to determine what the formal requirements of the prior hearing should be. (For an example of the balancing of interests analysis see Mr. Justice Powell's concurring opinion in

Arnett, 416 U.S., at 168-169, and his dissenting opinion in *Goss,* 419 U.S., at 591-594.) However, the Court's decisions also indicate that this analysis is not proper to assess the need for the prior hearing itself. *Roth* cited *Boddie* for the proposition that "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." 408 U.S., at 570 fn 8. But Mr. Justice Stewart also remarked in that opinion that "The constitutional requirement of opportunity for *some* form of hearing before deprivation of a protected interest, of course, does not depend upon such a narrow balancing process." 408 U.S., at 570-571, fn 8. Even conceding that the government's interests outweigh those of the Respondent, (and this is a concession impossible to make given this Court's rulings on the importance of property interests in wages, *see Sniadach* v. *Family Finance Corp.,* 345 U.S. 337, 340 (1969)), Respondent must still be allowed some sort of informal hearing procedure before he is deprived of his means of earning a living for himself and his family.

III.

THE OPINION OF THE SEVENTH CIRCUIT CORRECTLY APPLIED THIS COURT'S DECISION IN GOSS v. LOPEZ HOLDING THAT WHERE THERE HAS BEEN A DEPRIVATION OF A PROPERTY INTEREST OR THE INFRINGEMENT OF A LIBERTY INTEREST DUE PROCESS REQUIRES THERE BE A HEARING EITHER BEFORE OR IMMEDIATELY AFTER THE PROPOSED DEPRIVATION OR INFRINGEMENT.

In its opinion, the Court of Appeals applied the analytical techniques this Court has developed for dealing with the constitutional consequences of denying government employees their jobs. It began its opinion by finding that

the Respondent had a protected property interest in his employment. *Muscare* v. *Quinn,* 520 F.2d 1212, 1215 (1975) In so holding, it was consistent with this Court's decision in *Roth.* It recognized, as has this Court, that there is no fixed standard of due process but that its requirements change with the facts of each case. And, after analyzing the *Goss* decision, it concluded that:

> "In the circumstances of America's high schools, the Court (this Court) thought that notice, an explanation of the evidence the authorities have, and an opportunity to present his side of the story were sufficient to protect the student, and we think that at least this much is required in the circumstances of a public employee's suspension. Not only are alleged transgressions justifying suspension often more serious than school discipline problems, but the corresponding penalties are potentially more damaging, for reputations, careers and substantial amounts of lost pay are at stake." 520 F.2d, at 1215. (footnote omitted)

This judgment goes no further than Mr. Justice White's opinion for the Court in *Goss* where he notes that "The Court's view has been that as long as property deprivation is not *de minimis,* its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. (citations omitted) A 10-day suspension is not *de minimis* in our view and may not be imposed in complete disregard of the Due Process Clause." 419 U.S., at 576.

It is the opinion of the Illinois Supreme Court in *Kropel* v. *Conlisk,* 60 Ill.2d 17 (1975), that is inconsistent with the decisions of this Court. In that case a member of the Chicago Police Department was summarily suspended for 30 days under authority of Illinois Revised Statutes (1973), ch. 24, par. 10-1-18.1 which reads in part that "Nothing in this Section limits the power of the superintendent to sus-

pend a subordinate for a reasonable period, not exceeding 30 days." The lower court had found this section unconstitutional. The Illinois Supreme Court, in an opinion which was purely an exercise in statutory construction, salvaged the section by reading it "in pari materia" with other sections of the Civil Service Act which form the basis on which the Respondent in this case was suspended. In effect, the Court gave police officers in Chicago the same rights firemen and other civil service employees had enjoyed under ch. 24, par. 10-1-18 which reads in part: "any employee or officer suspended for more than 5 days or suspended within 6 months after a previous suspension shall be entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension." Although the Court never cited a single opinion of this Court, or even of its own, defining what due process requires in the case of government employee suspensions, it held that although "there are limits inherent in the fourteenth amendment to the United States Constitution" on such suspensions, providing no hearing at all for suspensions of five days or less and post suspension hearings for suspensions of over five days comported with these limits. Such a holding is contrary to that of this Court in *Goss*. That case should be read as Mr. Justice Powell has read it in his dissent in *Goss* and in his concurring and dissenting opinion in *Wood* v. *Strickland*, 420 U.S. 308 (1975). He concludes that *Goss* identifies a new constitutional right: "the right of a student not to be suspended for as much as single day without notice and a due process hearing either before or promptly following the suspension." 419 U.S., at 585. He explicitly characterizes *Goss* as "holding that a junior high school pupil routinely suspended for as much as a single day is entitled to due process." *Wood*, 420 U.S., at 329.

In the recent decision of *Boehning* v. *Indiana State Employees Assoc.*, ... U.S. ....., 44 LW 3275 (1975), this Court in a Per Curiam opinion abstained from deciding the due process question "because the controlling state statutes, as yet unconstrued by the state courts, might require the hearing demanded by respondent and so obviate decision on the constitutional issue." 44 LW 3275. The Illinois Supreme Court has here construed the relevant statutes and found that they do not require the hearing necessitated by *Goss*—to that extent this Court must find them defective.

CONCLUSION

For the reasons stated, it is submitted that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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MOTION FILED

FEB 4 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-130

ROBERT J. QUINN, INDIVIDUALLY AND AS COMMISSIONER OF THE CHICAGO FIRE DEPARTMENT,

Petitioner,

vs.

FRANCIS MUSCARE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH JUDICIAL CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
and
BRIEF FOR THE ILLINOIS DIVISION OF THE AMERICAN CIVIL LIBERTIES UNION AMICUS CURIAE.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH JUDICIAL CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

To The Honorable Chief Justice of Associate Justices of the Supreme Court of the United States:

The Illinois Division of the American Civil Liberties Union hereby respectfully moves for leave to file the attached brief *amicus curiae*. The consent of the attorney for the respondent has been obtained. The consent of the attorney for the petitioner was requested but refused.

The interest of the American Civil Liberties Union in this case arises from the fact that it is a nationwide, nonprofit organization representing over 350,000 members who share a belief in and concern for the ideas expressed in the Bill of Rights and other constitutional provisions affecting civil liberties. In par-

ticular, during its 56-year existence the ACLU has had a traditional interest in preserving the due process rights guaranteed by the Fifth and Fourteenth Amendments. The ACLU believes that fair procedures for all citizens must be constantly defended in order to protect the individual against arbitrary exercise of governmental power which is anathema to the maintenance of human dignity in a democracy.

The instant case presents a serious issue concerning procedural due process rights which are of vital concern to millions of state and local governmental employees. The Court of Appeals found that the concept of fundamental fairness mandated by the Fourteenth Amendment requires that such employees be given an opportunity for a hearing prior to suspension from their employment. The ACLU believes that this holding is correct and should be affirmed. The attached brief contains argument directed to certain aspects of this constitutional issue which have not and, it is believed, will not be contained in the briefs presented on behalf of respondent. If this argument is accepted, it would be dispositive of the case.

Accordingly, the granting of this motion and consideration of the attached brief *amicus curiae* are earnestly requested.

Respectfully submitted,

MICHAEL P. BUCKLO,
Attorney for Amicus Curiae.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH JUDICIAL CIRCUIT.

BRIEF FOR THE ILLINOIS DIVISION OF THE AMERICAN CIVIL LIBERTIES UNION AMICUS CURIAE.

QUESTIONS PRESENTED.

The argument in this brief will be directed solely to the following due process question and will not address the other issues upon which review was granted:

> Whether, in accordance with the due process command of the Fourteenth Amendment, a permanent public employee may be summarily suspended from his employment without pay for a period of 29 days, absent special circumstances, without prior notice of the charges against him and an opportunity for an appropriate prior hearing to dispute the grounds for those charges.

STATEMENT OF THE CASE.

Respondent Francis Muscare has been employed as a permanent civil servant with the Chicago Fire Department since 1955. During the course of his twenty-year employment as a firefighter, respondent has achieved the rank of lieutenant in the Department (A. 18, 129).

On the morning of February 27, 1974, three of Lt. Muscare's superiors appeared at his duty station and announced that he was being suspended and that he was immediately to turn in his equipment and badge (A. 19). At that time, Lt. Muscare was informed of neither the duration of his suspension nor the reason for its imposition, but only that he would later receive a letter explaining his offense and the nature of the punishment being imposed.

On March 4, 1974, the Department Chief of Personnel sent Lt. Muscare a letter stating that he had been suspended for a period of 29 days for alleged violations of § 51.133 (hair regulation), §61.001 (conduct unbecoming a member or employee) and § 61.006 (disobedience of orders) of the Rules and Regulations of the Chicago Fire Department (A. 11).

Lt. Muscare brought the present action in the United States District Court for the Northern District of Illinois on March 11, 1974, attacking both the constitutionality of these regulations and the summary suspension procedures employed which afforded him neither prior notice of the charges made against him nor an opportunity for any kind of prior hearing to dispute the grounds upon which these charges were based (A. 3-14).

The events leading to the suspension began in December 1973 when Lt. Muscare, along with the rest of his company, attended a class at the Chicago Fire Academy to obtain training in the use of self-contained breathing apparatus (A. 52). There an instructor advised that facial hair should not be worn with the breathing apparatus because it might prevent a proper

seal being obtained on the mask portion of the apparatus. Lt. Muscare disagreed with this advice and stated that firefighters in certain other large cities were allowed to wear long hair, beards and mustaches which were of no concern to their fire departments (A. 54, 56, 123). Furthermore, Lt. Muscare testified that during this course of instruction and in actual use he had experienced no difficulty in obtaining a proper seal with such masks (A. 127-129).

After class the instructor discussed the matter with the chief drillmaster and indicated that he did not know whether Lt. Muscare could obtain a good seal on his face mask while wearing a goatee (A. 71-73). Later that month, Lt. Muscare's superior officer told him to shave his goatee and that he was "working under charges" (A. 19). Lt. Muscare was not informed at that time of the specific nature of the "charges" against him or whether any disciplinary action would be taken with respect to them. Following this encounter, Lt. Muscare did not shave but continued to routinely work as a firefighter for a period of two and one-half months, during which nothing occurred concerning the matter until February 27, 1974, when he was suspended.

Furthermore, at no time during this period did the Acting Chief Fire Marshal with whom the "charges" had been lodged for determination of disciplinary action attempt to communicate with Lt. Muscare so as to provide him with an opportunity to explain or otherwise meet those charges (A. 111-112). In fact, the Acting Chief Fire Marshal conceded he was aware that a suspension for more than the 29-days imposed would have necessitated providing the prior hearing procedures required by the Illinois Municipal Code (A. 135-136).[1]

In addition, although Lt. Muscare was entitled upon request to a post-suspension hearing before the civil service

1. The Illinois Municipal Code provides that no officer or employee in the classified civil service "may be removed or discharged, or suspended for a period of more than 30 days, except for cause upon written charges and after an opportunity to be heard in his own defense." Ill. Rev. Stat. ch. 24, § 10-1-18 (1973).

commission to contest the propriety of his suspension,[2] no reference to this right was made in the suspension letter he received (A. 11).

Following a hearing on Lt. Muscare's request for a preliminary injunction, the District Court ruled that the suspension was constitutional (A. 147-154). The Court of Appeals for the Seventh Circuit reversed on the ground that Lt. Muscare had been suspended without procedural due process in that no hearing was accorded him prior to his suspension (A. 159-168).

ARGUMENT.

A. The Employment Interests Involved in the Present Case Are Vitally Important.

Since the founding of this Nation, the concept of "property" as it applies to the life of the average American citizen has dramatically changed. The basically agrarian and private entrepreneur society existing at that time in which wealth was generally derived from ownership of land or enterprise has gradually been supplanted by a society dependent upon wages and various governmental benefits as its primary source of wealth.[3] Furthermore, by virtue of the fact that it employs more than one out of six workers, government has become directly responsible for the economic livelihood and well-being of a major portion of the civilian labor force and their families.[4] Even more significant to this case, since 1960 state and local government employment has nearly doubled from 6.4 million

2. Ill. Rev. Stat. ch. 24, § 10-1-18 (1973).

3. *Goldberg* v. *Kelly*, 397 U. S. 254, 262 n. 8 (1970). See also Reich, *The New Property*, 73 YALE L. J. 734 (1964).

4. In 1974, 85.9 million workers were in the total employed civilian labor force, of which 2.9 million were federal civilian employees and 11.8 million were state and local government employees. U. S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1975, pp. 343 (Table 558), 243 (Table 405) and 272 (Table 440) respectively.

to 11.8 million employees,[5] whereas the civilian labor force has increased only about 30 percent.[6]

In response to this shift in the source of economic security to the government, those constitutional protections relating to "property", which guard the boundary between the private interests of the individual and the power of the state, have also enlarged to meet the legitimate expectations of our society.[7] For example, in recent years the due process guarantees of the Fifth and Fourteenth Amendments have been found to protect such non-traditional forms of wealth as welfare payments[8] and educational benefits for children.[9]

The present case therefore presents an important opportunity for this Court to provide guidance in an area critical to the economic well-being and security of a significant segment of our society. That is, what are the constitutional dimensions of the interest which millions of state and local governmental employees have in the uninterrupted continuation of their principal form of property—their jobs?

B. Respondent Has a Constitutionally Protected "Property" Interest in His Employment.

Recent decisions of this Court leave little doubt that Lt. Muscare has a constitutionally protected property interest in his employment with the Chicago Fire Department. According to Illinois law, a permanent public employee such as respondent may be discharged only upon a showing of "cause."[10] In *Arnett* v. *Kennedy*, 416 U. S. 134 (1974), six members of

5. *Id.* at 272 (Table 440).

6. An increase from 65.8 million employed workers in 1960 to 85.9 million employed workers in 1974. *Id.* at 343 (Table 558).

7. *Board of Regents* v. *Roth*, 408 U. S. 564, 577 (1972).

8. *Goldberg* v. *Kelly*, 397 U. S. 254 (1970).

9. *Goss* v. *Lopez*, 419 U. S. 565 (1975).

10. Ill. Rev. Stat. ch. § 10-1-18 (1973).

this Court found that a federal employee who similarily could only be discharged for "cause" had "a legitimate claim of entitlement which constituted a 'property' interest under the Fifth Amendment."[11]

The fact that respondent was suspended, rather than discharged, has no bearing upon the threshold due process issue. In determining "whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." *Board of Regents* v. *Roth*, 408 U. S. 564, 570-71 (1972). Here, the nature of respondent's interest in his employment extends to all but de minimus deprivations of that interest, including the 29-day suspension in question.[12] In *Goss* v. *Lopez*, 419 U. S. 565 (1975), this Court applied similar reasoning in holding that a 10-day suspension of high school students sufficiently affected the statutory property interest they had in a public education so as to bring into play the requirements of due process. Mr. Justice White, speaking for the majority in *Goss*, concluded:

> [T]he length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, "is not decisive of the basic right" to a hearing of some kind. *Fuentes* v. *Shevin*, 407 U. S. 67, 86, (1972). The Court's view has been that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. (419 U. S. at 576.)

Hence, the only issue remaining is whether due process requires that a hearing be provided respondent prior to his suspension.

11. *Arnett* v. *Kennedy*, 416 U. S. at 166 (Powell, J., concurring).

12. Lt. Muscare's 29-day suspension cannot be viewed as de minimis in that, at the very least, it involved the loss of some $1,400.00 in pay [A. 165].

C. Based Upon the Circumstances of the Present Case, the Court of Appeals Was Correct in Concluding That Respondent Was Entitled to a Prior Hearing.

This Court has often invoked the basic principle that, at a minimum, due process guarantees "that deprivation of life, liberty or property by adjudication be *preceded* by notice and opportunity for hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 313 (1950) (Emphasis added).[13]

At the outset, it is noted that no procedures of any kind were afforded respondent prior to his summary suspension. Although Lt. Muscare's Superior officer had indicated to him that he should shave his goatee and that he was "working under charges," respondent was never specifically informed of the nature of the charges against him or, most importantly, if any disciplinary action would be taken with respect to them.[14]

Granting that the application of due process guarantees is an "intensely practical" matter[15] which "negates any concept of inflexible procedures,"[16] this Court has uniformly held in cases involving the loss of wages that fundamental fairness requires notice and an opportunity for a hearing prior to suspension of the interest at stake.[17] The rationale underlying

13. The applicability of this rudimentary concept of procedural due process was recently reaffirmed by the Court in *Goss* v. *Lopez*, 419 U. S. at 579.

14. In fact, based upon the prior incidents involving his goatee where no disciplinary action had been imposed, Lt. Muscare would have no real reason to believe that he would be disciplined for his actions in the present case (A. 123-127).

15. *Goss* v. *Lopez*, 419 U. S. at 578.

16. *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895 (1961).

17. *Arnett* v. *Kennedy*, 416 U. S. 134 (1974); *Perry* v. *Sindermann*, 408 U. S. 593 (1972); *North Georgia Finishing* v. *Di-Chem*, 419 U. S. 601, 611 n. 2 (1975) (Powell, J., concurring). In addition, a three-judge district court recently held in *Eley* v. *Morris*, 390 F. Supp. 913 (N. D. Ga. 1975), that in accordance with the dictates of *Arnett*, an opportunity to be heard prior to discharge must be afforded Georgia governmental workers.

these decisions is based, in part, upon the fact that wages constitute "a specialized type of property presenting distinct problems in our economic system." *Sniadach* v. *Family Finance Corp.*, 345 U. S. 337, 340 (1969).

Furthermore, the right to a prior hearing in cases that threaten the deprivation of wages comports with the underlying due process precepts of ensuring the accuracy of the fact finding process and of generating the feeling that the individual has been treated with the human dignity required of our democratic form of government. As Mr. Justice Frankfurter observed concurring in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 171-72 (1951):

> No better instrument has been devised for *arriving at truth* than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for *generating the feeling*, so important to a popular government, *that justice has been done*. (Emphasis added.)

The latter purpose of "generating the feeling . . . that justice has been done" is particularly important in the case of a wage earner, such as respondent, who is placed in jeopardy of being cut off from the very source of his economic security. Since most public employees earn modest annual wages, any interruption of their current income is likely to cause immediate hardship by depriving them of the only means available for meeting day-to-day living expenses.[18] In such situations the opportunity for a prior hearing has traditionally been utilized to alleviate the feelings of humiliation, frustration and anguish which would surely otherwise accompany a sudden and summary deprivation by the State of these interests essential to the legitimate expectations and well-being of the individual.[19]

18. In 1974 the average pay of full-time federal civilian employees was $12,518 yearly. U. S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1975, p. 245 (Table 407).

19. See Surbin & Dykstra, *Notice and the Right to Be Heard: The Significance of Old Friends*, 9 Harv. Civ. Rights—Civ. Lib. L. Rev. 450, 452-57 (1974), for a complete analysis of the historical and psychological bases for due process rights.

Even if it appears that the facts are known and the law clear, prior procedural rights are no less necessary based upon these vital humanizing grounds.

> The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.[20]

In addition, such prior safeguards serve the practical purposes of providing the accused an opportunity to bring himself within one of the exceptions which accompany most legal rules, or to articulate the need for creation of a new exception, or to call to the attention of a remote decisionmaker facts in mitigation of the charges against him.[21]

It is submitted that the decision of the Court of Appeals finding that respondent, a twenty-year veteran of the civil service, was denied due process as a result of his summary and unexpected suspension is not only in accord with the previous rulings of this Court but is required by these basic principles underlying the Due Process Clause. Such rudimentary protection is essential to the concept of fundamental fairness mandated by the Fourteenth Amendment.

20. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. at 171 (Frankfurter, J., concurring).

21. The importance of providing additional due process protection when dealing with a "faceless" administrator, such as the Acting Chief Fire Marshal in the present case who made the decision to suspend respondent without ever seeing him, was noted by Mr. Justice Powell dissenting in *Goss* v. *Lopez*, 419 U. S. at 595 n. 13.

CONCLUSION.

For the reasons given, the *amicus curiae* believes that the holding below should be affirmed on the ground that respondent was denied due process.

Respectfully submitted,

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February 4, 1976.

MOTION FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-130

ROBERT J. QUINN, individually and as Commissioner of the Chicago Fire Department, *Petitioner,*

v.

FRANCIS MUSCARE, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF FOR THE COALITION OF AMERICAN PUBLIC EMPLOYEES, AMICUS CURIAE

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MOTION OF COALITION OF AMERICAN PUBLIC EMPLOYEES FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 42(3) of the Rules of this Court, the Coalition of American Public Employees respectfully moves for leave to file the attached brief as *amicus curiae*. Respondent has consented to the filing of this brief; petitioner has advised that it "will neither agree nor oppose your application to file such an amicus curiae brief."

The Coalition is an association of six organizations which represent public employees in a variety of professions and occupations at all levels of government. The combined membership of these organizations is ap-

proximately three million, and they act as collective bargaining representative for approximately five million employees.

The Coalition's constituent organizations are the following:

The *National Education Association* (NEA), which is the largest teacher organization in the United States, and has a membership of approximately 1.7 million educators, most of whom are employed in public educational institutions.

The *American Federation of State, County, and Municipal Employees* (AFSCME), AFL-CIO, whose membership is comprised of approximately 750,000 employees of state and local governments.

The *National Treasury Employees Union* (NTEU), whose 75,000 members are non-supervisory employees of the United States Department of the Treasury.

The *American Nurses' Association* (ANA), which has 205,000 members, many of whom are employed in state and local governmental institutions.

The *Physicians' National Housestaff Association* (PNHA), which has a membership of approximately 18,000 physician housestaff officers, predominantly interns and residents, many of whom are employed by state and local institutions.

The *National Association of Social Workers* (NASW), which has 64,000 members, many of whom are employed by state and local governments.

The present case presents an issue of vital importance to these organizations and their members: whether a public employee who is accused of misconduct in his

job is entitled to notice and hearing before he can be suspended without pay or otherwise punished. The Coalition has previously participated as *amicus* in other cases before this Court which raise significant issues pertaining to the procedural due process rights of public employees. Thus, the Coalition filed a brief in *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), and has also filed a brief in the pending case of *Bishop* v. *Wood,* No. 74-1303. Accordingly, the Coalition desires to present its views to the Court concerning the issues raised in the present case.

While the parties will necessarily concentrate their attention on the particular facts and circumstances of this case, our brief deals somewhat more broadly with the underlying constitutional issues. For example, our brief discusses the question of the type of hearing required in cases of this kind—a matter which, we understand, will not be discussed in the brief for respondent. Thus, although one purpose of this brief is to express support for the position of respondent and the decision of the court below, we also believe that we can shed some additional light on the issues presented and thus be of assistance to the Court.

Respectfully submitted,

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BRIEF FOR THE COALITION OF AMERICAN PUBLIC EMPLOYEES, AMICUS CURIAE

SUMMARY OF THE FACTS

Since the parties' briefs will describe the facts of this case in detail, we will summarize here only those elements which we consider especially pertinent to the issues discussed in this brief.

Respondent Francis Muscare, the plaintiff below, has been employed as a firefighter with the Chicago Fire De-

partment since 1955. He currently holds the rank of lieutenant.

The Department has a rule, entitled "proper personal appearance," which requires its employees to "present a clean and proper appearance in personal care and attire at all times." The rule further states:

> "The face shall be clean-shaven, except that a non-eccentric mustache is permissible. Mustaches shall not extend beyond a line perpendicular to the corner of the mouth and the full upper lip must be readily visible." (A. 13.)

Despite this rule, Muscare has from time to time worn a small beard or goatee. In the past he had been chastised for this, but until the present case arose no punitive action had been taken against him. (A. 122-25.)

In October 1973 Muscare again grew a goatee. In December of that year he attended a class on the use of self-contained breathing apparatus, at which the instructor, one Leonard Johnson, stated that facial hair often interferes with the proper fit of the face mask on such apparatus. Muscare testified at trial, however, that he has frequently used the breathing apparatus over his beard without difficulty, both in actual fire conditions and in drills. (A. 126-28).[1]

Johnson reported to his superiors that Muscare was wearing a beard, and expressed concern that "he wouldn't get a good seal on the face piece." (A. 71.) Shortly thereafter Muscare was instructed by his superior officer, Chief Morgan, to remove the beard. When he failed to do so, Morgan filed a "charge" against him

[1] Petitioner's witnesses conceded at trial that only the person wearing the face mask can determine whether he has obtained a good seal. (A. 67, 93-94, 111.)

within the Department. (A. 19.) Muscare was never given a copy of this charge or told precisely what it contained. Nor was he given any hearing or other opportunity to explain or defend his conduct.

In accordance with Department procedures, the charge was referred to Acting Fire Marshall William F. Foley, who received it on December 21, 1973. (A. 104.) A few days later, Foley was hospitalized with appendicitis, and he did not return to duty until February 10 or 12. (A. 105.) During his absence, no action was taken with respect to the charge against Muscare. (A. 109.)

On February 27, 1974—more than two months after the filing of the charge—Muscare was orally notified that he was being suspended, effective immediately. Several days later, he received a formal written notice (A. 12) that he was suspended without pay for 29 days, from February 27 to March 28, for violating Sections 61.001, 61.006 and 51.133 of the Department's regulations. Section 51.133 is the "personal appearance" regulation referred to above. The other two rules cited in the notice list as punishable offenses "Conduct unbecoming a member or employee of the Chicago Fire Department" and "Disobedience of Orders." (A. 14.) There is no prescribed punishment for violation of any of these regulations; the penalty is entirely within the discretion of the Chief Fire Marshal. (A. 134.)

On these facts, the Court of Appeals held that the Department's failure to provide Muscare with notice and some form of hearing prior to the suspension violated his right to procedural due process. Although Muscare had a right under Illinois law to appeal his suspension to the Chicago Civil Service Commission, the

court concluded that such post-suspension review would not satisfy the requirements of due process. The court found it unnecessary to determine precisely what type of pre-suspension hearing Muscare was entitled to, "since no hearing of any kind was accorded appellant prior to his suspension." (A. 164.) The court also found it unnecessary to pass on the constitutionality of the Department's personal appearance regulation.[2]

[2] Petitioner argues that if this Court reverses the Court of Appeals' decision on the due process issue, it should proceed to decide the constitutionality of the personal appearance regulation, rather than remanding the case for a determination of that issue. Our view, of course, is that the Court should affirm the decision below, which would make it unnecessary to reach the personal appearance issue. In any event, the question of the extent to which a governmental agency can constitutionally regulate the personal appearance of its employees is pending before this Court in another case, *Barry* v. *Dwen*, No. 74-1269, which has already been argued and may be shortly decided. In these circumstances, we will not brief this issue. Suffice it to say that we agree with what appears to be the prevailing view among the lower federal courts, namely that the constitutional concept of "liberty" includes a person's right to choose his own hair style or decide for himself whether to wear a beard, and that any limitation on that right must be justified by some overriding governmental need. Although petitioner has attempted to justify the rule in this case on the ground that it is designed to insure the safe use of face masks, the court below was plainly correct in noting that the rule "does not appear to be co-extensive with the need for safe and efficient use of gas masks and, if that is the sole justification, might well be more narrowly drawn." (A. 160 n.2.) Moreover, as pointed out above, Muscare testified that his particular beard does not interfere with his ability to use a face mask.

ARGUMENT

THE SUSPENSION OF MUSCARE WITHOUT PRIOR NOTICE AND HEARING VIOLATED HIS RIGHT TO PROCEDURAL DUE PROCESS, SINCE HE HAD A "PROPERTY" INTEREST IN HIS JOB AND THERE WERE NO EXIGENT CIRCUMSTANCES REQUIRING HIS IMMEDIATE REMOVAL

There appears to be no dispute in this case that the 29-day suspension and consequent loss of pay imposed on Muscare deprived him of "property" within the meaning of the due process clause of the Fourteenth Amendment. As this Court made clear in *Board of Regents* v. *Roth*, 408 U.S. 564, 576-78 (1972), an employee has a "property" interest in his job if he has "a legitimate claim of entitlement to it," i.e., if he can only be deprived of it for "sufficient cause." See also *Perry* v. *Sindermann*, 408 U.S. 593, 601-02 (1972); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Goss* v. *Lopez*, 419 U.S. 565, 573 (1975). That is certainly the situation here. Muscare was a member of the "classified civil service" entitled to the protection of Section 10-1-18 of the Illinois Municipal Code (Ill.Rev.Stat. 1973, ch. 24), which provides as follows:

> "Except as hereinafter provided in this section, no officer or employee in the classified civil service of any municipality who is appointed under the rules and after examination, may be removed or discharged or suspended for more than 30 days, except for cause upon written charges and after an opportunity to be heard in his own defense . . . Nothing in this Division 1 limits the power of any officer to suspend a subordinate for a reasonable period, not exceeding 30 days except that any employee or officer suspended for more than 5 days or suspended within 6 months after a previous suspension shall be entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension. . . ."

While the word "cause" does not appear in reference to a suspension of less than 30 days, the statute as a whole, particularly the provision for civil service commission review of "the propriety of such suspension," makes clear that "cause" is required, and petitioner does not contend otherwise. The only distinction between a suspension of more than 30 days and a shorter suspension is that in the former case the statute requires a prior hearing, while in the latter case only a post-suspension hearing is provided.

The question thus presented is whether the post-suspension hearing contemplated by the statute satisfies the requirements of due process. We submit that it does not. As we shall show, the decisions of this Court have consistently held that notice and hearing must be afforded before, not after, a person is deprived of property or liberty, unless there is some overriding governmental need for immediate action which justifies postponing the hearing until after the event. As we shall also show, this Court's decision in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), upon which petitioner relies, is not inconsistent with this principle and does not justify the failure to provide a pre-suspension hearing in this case. Finally, we shall demonstrate that there is no merit in petitioner's contention that, because Muscare's violation of the no-beard rule was apparent and uncontrovertible, no hearing was required in this case.

A. In the Absence of Unusual Circumstances Which Are Not Present Here, Notice and Hearing Must Be Provided Before, Not After, a Person Is Deprived of Property or Liberty

In *Board of Regents* v. *Roth, supra,* this Court stated: "When protected interests are implicated, the right to some kind of *prior* hearing is paramount." 408 U.S. at 569-70 (emphasis added). This statement

was followed by a long footnote succinctly summarizing the applicable constitutional principles:

> "Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' Boddie v. Connecticut, 401 U.S. 371, 379. 'While "[m]any controversies have raged about . . . the Due Process Clause," . . . it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate [a protected] interest . . . , it must afford "notice and opportunity for hearing appropriate to the nature of the case" *before* the termination becomes effective.' Bell v. Burson, 402 U.S. 535, 542. For the rare and extraordinary situations in which we have held that deprivation of a protected interest need not be preceded by opportunity for some kind of hearing, see, *e.g.*, Central Union Trust Co. v. Garvan, 254 U.S. 554, 566; Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 597; Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594." *Id.* at 570 n.7 (emphasis in original).

The Court further stated that while " '[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings' . . . [t]he constitutional requirement of opportunity for *some* form of hearing before deprivation of a protected interest, of course, does not depend upon such a narrow balancing process." *Id.* at n.8. (Emphasis in original.) Thus, the fact that the present case involves a 29-day suspension rather than a longer suspension or a dismissal does not obviate the need for "some form" of prior hearing.

The effect of *Roth* was to make applicable to the area of public employment the due process principles which the Court has frequently applied in other contexts. Thus, in *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), the Court held that a prejudgment garnishment of wages without prior notice and hearing violated due process, even though such garnishment merely served to freeze the employee's wages pending a trial of the underlying claim. It is noteworthy that the amount involved in *Sniadach* was only $31.59, far less than the approximately $1,400 which Muscare lost as a result of his suspension. Similarly, in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), the Court held that a prior evidentiary hearing is required before welfare benefits can be terminated, and that a procedure which provides only a post-termination hearing violates due process. The same principle was applied to the suspension of a driver's license in *Bell* v. *Burson,* 402 U.S. 535 (1971), to the repossession of personal property in *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), to the revocation of parole in *Morrissey* v. *Brewer,* 408 U.S. 471 (1972), and to the suspension of public school students in *Goss* v. *Lopez,* 419 U.S. 565 (1975).[3]

In all of these cases, of course, the Court recognized that an exception to the prior-hearing requirement

[3] Petitioner characterizes *Goss* as merely holding that a hearing is required "either before or promptly after" a student is suspended. (Pet.Br. 20.) In fact, however, the Court held that "as a general rule notice and hearing should precede removal of the student from school." Only if the student "poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process" may he be "immediately removed from school," in which event the hearing "should follow as soon as practicable." 419 U.S. at 582-83.

can be made "in extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Roth, supra,* 408 U.S. at 570 n.7 (quoting *Boddie* v. *Connecticut,* 401 U.S. 371, 379 (1971)). "Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of bank failure, and to protect the public from misbranded drugs and contaminated food." *Fuentes* v. *Shevin, supra,* 407 U.S. at 91-92 (footnotes omitted). This exception, however, applies only to "emergency situations," *Bell* v. *Burson, supra,* 402 U.S. at 542, "where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance." *Goldberg* v. *Kelly, supra,* 397 U.S. at 263 n.10 (quoting *R. A. Holman & Co.* v. *SEC,* 299 F.2d 127, 131 (D.C.Cir.), *cert. denied,* 370 U.S. 911 (1962)).

No such emergency situation is involved in this case. Muscare did not present a "continuing danger to persons or property or an ongoing threat of disrupt[ion]" which required his "immediate removal" from the job. *Goss* v. *Lopez, supra,* 419 U.S. at 582. The fact that no action was taken for more than two months after the original "charge" was filed against him demonstrates that the Department did not consider the matter to be of any particular urgency. The governmental interest at stake here was not the need to eliminate an immediate threat to the efficient operation of the Department, but merely the desire to punish an employee for an alleged violation of a rule. In such a situation, a hearing must precede, not follow, the determination of guilt and the imposition of punishment.

B. Arnett v. Kennedy Does Not Support the Department's Failure To Provide a Pre-Suspension Hearing

Petitioner contends that in *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), "a majority of five justices held that due process is satisfied by administrative procedures which provide for a post-removal hearing, with the right to reinstatement and back pay if the removal decision is later found to have been wrongful." (Pet. Br. 21.) In fact, however, *Arnett* provides no support for petitioner's position here. To demonstrate this, it is necessary to analyze the separate opinions in that case, since there was no opinion for the Court.

Arnett involved a challenge to the constitutionality of the dismissal procedures applicable to certain federal employees under the Lloyd-LaFollette Act, 5 U.S.C. § 7501, as supplemented by regulations of the Civil Service Commission. Those procedures provide (1) 30 days' advance written notice of any proposed dismissal, with a full statement of reasons, (2) an opportunity during such 30-day period for the employee to examine any material on which the charges against him are based, including statements of witnesses, documents, and investigative reports, (3) an opportunity to answer the charges orally and/or in writing, and to submit affidavits in support of such answer, *before* a final decision is made, and (4) a right to a full trial-type hearing *after* the dismissal becomes effective, before a neutral hearing officer who has authority to award reinstatement and back pay.

The issue in *Arnett* was *not* whether the employee was entitled to notice and "some form" of hearing prior to his dismissal. He had been provided a notice and a type of hearing—i.e., an opportunity to answer the charges against him, orally and in writing—before

his discharge became effective. The employee claimed, however, that these pre-dismissal procedures were constitutionally inadequate, that he was entitled to a full trial-type hearing before he could be removed from his job.

The plurality opinion, written by Justice Rehnquist and joined by the Chief Justice and Justice Stewart, did not reach the question of whether the procedures under review satisfied constitutional standards of procedural due process. Because those procedures were provided by the same statute which established the employee's right to be discharged only for "cause," and because in the absence of such statute an employee could be summarily dismissed for any reason whatever, the plurality reasoned that the procedures were a limitation on the employee's "property" right, and that the employee therefore had no constitutional claim to any greater procedural safeguards than those which the statute itself provided. As the opinion put it, "The employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but rather such a guarantee as enforced by the procedures which Congress has designated for the determination of cause." *Id.* at 152.

The plurality's views, however, were expressly rejected by the other six Justices who participated in *Arnett.* See *id.* at 166-67 (concurring opinion of Justice Powell), 177-78, 185 (opinion of Justice White, concurring in part and dissenting in part), and 210-11 (dissenting opinion of Justice Marshall). As Justice White put it:

> "The fact that the origins of the property right are with the State makes no difference for the

> nature of the procedures required. While the State may define what is and what is not property, once having defined those rights the Constitution defines due process, and as I understand it six members of the Court are in agreement on this fundamental proposition." *Id.* at 185.[4]

Justice Powell, in an opinion joined by Justice Blackmun, concurred in the result reached by the plurality "on the basis of different reasoning." *Id.* at 164. After first determining (contrary to the plurality's view) that constitutional due process standards must be applied, the concurring opinion stated that the question of whether a full evidentiary hearing must be provided before dismissal "depends on a balancing process in which the Government's interest in expeditious removal of an employee is weighed against the interest of the affected employee in continued employment." *Id.* at 167-68. In concluding that the Government's interest outweighed the employee's, the concurring opinion stressed two factors which are not present in this case. First, it argued that the Government must be able "to remove employees whose conduct hinders efficient operations and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency."

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[4] The lower federal courts have recognized that the reasoning of the plurality was rejected by the rest of the Court and therefore is not the law. See, e.g., *Geneva Towers Tenants Organization* v. *Federal Mtge. Investors,* 504 F.2d 483, 489 (9th Cir. 1974); *Peacock* v. *Board of Regents,* 510 F.2d 1324, 1328 n.4 (9th Cir. 1975), *cert. denied,* 422 U.S. 1049 (1975); *Mattern* v. *Weinberger,* 519 F.2d 150, 160 n.20 (3d Cir. 1975); *Mondell* v. *Mayor and City Council of Baltimore,* 378 F.Supp. 219, 222 (D.Md. 1974).

Id. at 168. Second, it pointed out that the pre-dismissal procedures which had been provided, and which included notice of the charges and an opportunity to answer them, were sufficient to "minimize the risk of error in the initial removal decision." *Id.* at 170.

A quite different situation is presented here. First of all, the present case, unlike *Arnett,* involves a suspension imposed as a penalty, not a dismissal of an unwanted employee. There is no claim here that Muscare's conduct so "hinder[ed] efficient operations" or was so "disruptive or otherwise unsatisfactory" that his continued employment would "affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of" the Department. The purpose of the suspension was not to remove Muscare from the work place, but merely to punish him for an alleged violation of Department rules. Thus, no legitimate interest of the Department would have been impaired if the imposition of such penalty had been deferred pending notice and hearing.

Furthermore, Muscare, unlike the employee in *Arnett,* was not given any notice of the charges against him or any opportunity to respond to those charges prior to his dismissal. In *Arnett,* the employee did receive "some form" of hearing, and the question was whether the type of hearing provided was adequate. The balancing-of-interests approach of the concurring opinion in *Arnett* has traditionally been used by the Court in resolving that kind of issue. See *Roth, supra,* 408 U.S. at 570 n. 8. However, "[t]he constitutional requirement of opportunity for *some* form of hearing before deprivation of a property interest . . .

does not depend upon such a narrow balancing process." *Ibid.* (emphasis in original).

The other opinions in *Arnett* held that the procedural safeguards provided to the employee in that case fell short of satisfying due process standards. Justice White was of the view that some form of pre-dismissal hearing is required, but that it need not be a full trial-type hearing. He concluded that the notice and opportunity to answer charges provided by the statute and regulations were adequate, but that the decision at that stage must be made by an "impartial decisionmaker." Since he found that the decisionmaker in *Arnett* was not impartial, he concluded that the requirements of due process had not been met.

The other dissenting Justices, Marshall, Douglas and Brennan, all would have held that the employee is entitled to a full trial-type hearing prior to his dismissal.

In short, *none* of the several opinions in *Arnett* stands for the proposition that a public employee with a property interest in his job can constitutionally be dismissed or suspended without *any* form of prior notice and hearing. The plurality did not reach the constitutional issue, and the other opinions all focused on the question of whether a full trial-type hearing must be afforded before dismissal or whether the lesser type of pre-termination hearing provided in that case was adequate. As the Court itself recently observed, *Arnett* presented the issue of a "tenured employee's right to a preremoval hearing . . . only in the context of a statute providing notice and opportunity to respond in writing before removal coupled with a full hearing after removal." *Boehning* v. *Indiana State*

Employees Ass'n, Inc., 44 U.S.L. Week 3275 n.* (Nov. 11, 1975).[5]

That *Arnett* did not modify the long-standing principle that "some form" of hearing is required before there can be any deprivation of liberty or property is made clear by the subsequent decision in *Goss* v. *Lopez*, 419 U.S. 565 (1975). That case involved the suspension of public school students for a period of 10 days, a deprivation which is certainly far less severe than the 29-day suspension without pay involved in this case. While the Court held that only a rudimentary form of notice and hearing is required, it made clear that "as a general rule the notice and hearing should precede removal of the student from the school." *Id.* at 582. The Court also noted that "[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures." *Id.* at 584.

Since Muscare was given no prior hearing of any kind, it is not necessary for this Court to decide precisely what type of hearing was required to satisfy due process in this case. The Court may nevertheless wish to address this question, however, and we will therefore briefly state our views on the matter.

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[5] Subsequent to *Arnett*, there have been two cases brought in the federal courts challenging public employee dismissal procedures which provided only post-dismissal hearings, but no pre-dismissal hearing of any sort. In both cases, the courts held, in well-reasoned opinions which analyzed *Arnett* essentially as we have done above, that some form of pre-dismissal notice and hearing akin to that provided in *Arnett* is constitutionally required. *Eley* v. *Morris*, 390 F.Supp. 913 (N.D.Ga. 1975) (3-judge court); *Young* v. *Hutchins*, 383 F. Supp. 1167 (M.D.Fla. 1974).

We submit that the abbreviated type of pre-deprivation hearing which was upheld in *Arnett* and deemed sufficient in *Goss* would not be adequate in the kind of situation involved here. In *Arnett,* the Government's interest in promptly eliminating an unwanted and allegedly disruptive employee was considered—at least by three Justices—to outweigh the employee's interest in more effective pre-dismissal safeguards. In *Goss,* the Court held that only a brief and informal hearing was required because of the relatively mild character of the deprivation involved in that case. Neither of these considerations is applicable here. Certainly a 29-day suspension—which cost Muscare approximately $1,400—is a very serious deprivation to a working man. As the Court of Appeals noted, "[s]uch a financial blow can be disastrous to many civil servants." (A. 164 n. 3.) And where the government's interest is in penalizing an employee for alleged misconduct rather than permanently removing him from his job, there is no need—and therefore no justification—for delaying the full hearing until after the penalty has been imposed.

Accordingly, we believe that before a public employee can be made to suffer a significant loss of pay or other substantial penalty for alleged misconduct, he must be afforded the type of hearing which the Court has required "[i]n almost every setting where important decisions turn on questions of fact," namely, one which includes "an opportunity to confront and cross-examine adverse witnesses." *Goldberg* v. *Kelly,* 397 U.S. 254, 270 (1970) (and cases cited therein). The other safeguards required in *Goldberg*—including an impartial decisionmaker, the right to counsel, the right to present evidence and argument, and the right

to a reasoned decision based on the hearing record—should also be provided. These rights have long been considered the essential elements of due process, and the reasons relied upon for not providing such safeguards in *Arnett* and *Goss* are not applicable here.

C. The Need for a Hearing in This Case

Petitioner's brief suggests that no purpose would have been served by a hearing in this case, since Muscare "admitted that he was familiar with the departmental safety regulation governing facial hair" and his "contemptuous defiance of the regulation and the orders of his superiors was open and unmistakable." "The only actual issue in dispute," petitioner contends, "was the constitutional validity of the departmental facial hair rule. But that could not be determined by an administrative hearing." (Pet. Br. p. 31.)

This argument will not withstand analysis. The ultimate issue to be decided within the Department was not simply whether Muscare had violated a regulation, but also whether the nature of the violation and the surrounding circumstances were such as to warrant punitive action—and, if so, what the penalty should be. There was no rule requiring suspension of any fireman wearing a beard—and certainly no rule requiring a suspension of 29 days. The penalty to be imposed, if any, was a matter to be determined by the Chief Fire Marshal. Thus, even if Muscare could not deny that he had violated the regulation, a hearing was required to give him an opportunity to explain or justify his conduct, or to show mitigating circumstances. As this Court stated in *Morrissey* v. *Brewer,* 408 U.S. 471, 488 (1972), "[t]he parolee must have an opportunity to be heard and to show, if he can, that he did not violate the

conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation." See also *Cooke* v. *United States*, 267 U.S. 517, 538 (1925) ("evidence bearing on the degree of guilt and the penalty to be imposed" are a "proper part of the defense" in a contempt hearing); *Gagnon* v. *Scarpelli*, 411 U.S. 778, 790 (1973) (even where a violation of probation is a "matter of record," there may be "reasons which justified or mitigated the violation and make revocation inappropriate").

Even petitioner does not claim that a 29-day suspension is necessarily an appropriate penalty for any violation of the no-beard rule. Rather, petitioner argues that Muscare was guilty of "contemptuous defiance of the regulation" and "open and unmistakable" disobedience of orders. However, the only fair and reliable way to determine whether these characterizations of Muscare's conduct are accurate is on the basis of evidence presented at a hearing. Such a hearing, we submit, should have been held within the Department *before* any action was taken against Muscare.

Petitioner's contention that Muscare was "defiant" and flagrantly insubordinate is apparently based on the evidence presented at the trial of this case. Since this was not one of the issues to be determined in this litigation, however, it cannot be assumed that all of the evidence pertaining to it has been presented. We do not know, for example, whether Muscare had obtained legal advice as to whether he had a constitutional right to wear a beard. If an attorney had advised him that the regulation was unconstitutional and need not be obeyed, that would certainly tend to mitigate any claim of defiance or deliberate insubordination. We also do not know the extent to which the rule had been enforced

against other employees. *Cf. Ramsey* v. *Hopkins*, 320 F.Supp. 477 (N.D.Ala. 1970), *remanded*, 447 F.2d 128 (5th Cir. 1971). It may be that the Department's prior conduct toward Muscare or other employees with beards had created the impression that the regulation was not to be taken seriously, or that it need only be obeyed at ceremonial occasions such as inspections and the like. After all, Muscare had worn a beard in the past, and while he had been directed to remove it he had never previously been punished for it. Moreover, it appears that no one objected to Muscare's latest beard for several months after he grew it.[6]

A hearing would also have given Muscare an opportunity to explain why it was important to him to wear a goatee. We do not know whether it was intended solely to enhance his appearance, or whether it had some religious or cultural significance. *Cf. Finot* v. *Pasadena City Board of Education*, 250 Cal.App.2d 189, 58 Cal. Reptr. 520 (1968); *Braxton* v. *Board of Pub. Instr.*, 303 F.Supp. 958 (M.D.Fla. 1969). Even if the reason given would not justify the violation of the rule, it would be a factor to be weighed in determining the penalty to be imposed.

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[6] In explaining why he decided to punish Muscare as severely as he did, the Chief Fire Marshal cited the fact that Muscare had violated the beard regulation in the past, and had not complied during the two-month period that the charge was pending. Indeed, he testified that he had first contemplated only "a minimum action," but decided on a more severe penalty when he learned that Muscare had not shaved his beard while the charge was pending. (A. 134.) On the other hand, Muscare may have concluded, from the fact that he had not been punished in the past and the fact that no action was taken on the charge for a considerable period, that the Department did not consider his violation to be very serious or important. Thus, the same circumstances which in the Fire Marshal's view served to aggravate the offense may have led Muscare to minimize the importance of the matter.

Another matter which might have been raised at a hearing is whether, in fact, Muscare's beard would interfere with his ability to safely use the self-contained breathing apparatus. Throughout this case, the Department has vigorously asserted that the reason for the rule is that facial hair generally interferes with the proper use of such equipment. To be sure, the Department also contends that it has a right to impose a general rule, even though in individual cases a face mask can successfully be worn over a beard. But even assuming the validity of such a general rule, the Chief Fire Marshal might have been less inclined to punish Muscare—or to punish him so severely—if Muscare had been able to show, at a hearing, that he was able properly and safely to use a face mask despite his beard.

In short, petitioner's contention that there was no need for a hearing in this case is without merit. Even though Muscare could hardly deny the existence of his beard, a hearing was nevertheless required to determine whether punitive action was appropriate, and, if so, what the penalty should be.

There is, moreover, an even more fundamental answer to petitioner's argument. This Court has never held, in cases dealing with procedural due process, that a person's right to a hearing is dependent upon his ability to show in advance that there are disputed issues to be resolved at such a hearing. In *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969), for example, the Court did not hold that a wage-earner must show that he has a colorable defense to the underlying claim against him before he is entitled to a hearing with respect to the garnishment of his wages.

In *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), the Court did not hold that a welfare recipient threatened with termination of his benefits must show the existence of a legitimate issue relating to his eligibility before he is entitled to a hearing. In *Morrissey* v. *Brewer,* 408 U.S. 471 (1972), the Court did not hold that a parolee must show that he has some basis for contesting the revocation of his parole before he is entitled to a hearing on the matter. In *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), the Court did not hold that a conditional-sales purchaser must produce evidence that he is not in default on his debt before he is entitled to a hearing with respect to the repossession of his property. In all of these cases, it was the nature of the deprivation involved which created the right to a hearing, not the nature of the issues in dispute between the parties.

When a hearing is held, of course, the procedures to be followed can be tailored to fit the issues actually raised at such hearing. For example, if it should appear in a particular case that the facts are not in dispute, there would be no need for the testimony of witnesses and the hearing could be limited to the presentation of arguments. But there must be some kind of hearing, "appropriate to the nature of the case," *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950), whenever a deprivation of liberty or property is involved. To hold that this right depends upon a prior showing that there are in fact disputed issues to be resolved in such a hearing would merely create uncertainty and foster needless litigation.

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted,

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